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SUBMITTED

## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 205

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MISSOURI, KANSAS & TEXAS RAILWAY COMPANY AND  
UNITED STATES FIDELITY AND GUARANTY COM-  
PANY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF OKLAHOMA AND THE CITY OF  
McALESTER, OKLAHOMA

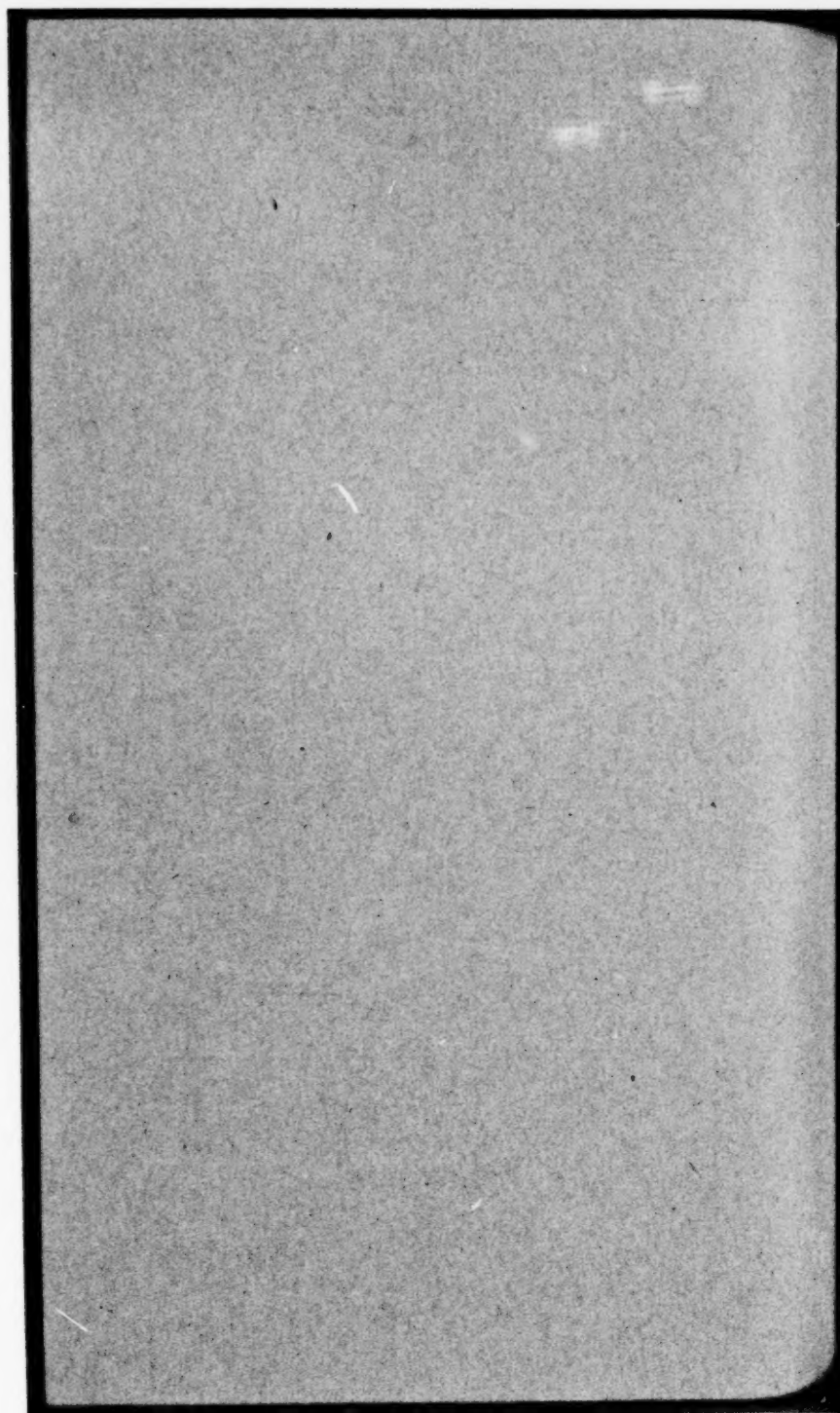
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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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FILED NOVEMBER 17, 1924

(30,694)



(80,694)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 729

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY AND  
UNITED STATES FIDELITY AND GUARANTY COM-  
PANY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF OKLAHOMA AND THE CITY OF  
McALESTER, OKLAHOMA

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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[fol. 1] **IN SUPREME COURT OF OKLAHOMA**

**RETURN TO WRIT OF ERROR**

UNITED STATES OF AMERICA,  
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Oklahoma, in the City of Oklahoma City, this 28th day of October, A. D., 1924.

Wm. M. Franklin, Clerk Supreme Court of Oklahoma, by  
Reuel Haskell, Jr., Assistant. (Seal of Supreme Court,  
State of Oklahoma.)

Costs of suit:

Plaintiff's costs, \$— paid by City of McAlester, Okla.

Defendant's costs, \$40.00, paid by Missouri, Kansas & Texas Railway Company.

Costs of Transcript, \$34.10, paid by Missouri, Kansas & Texas Railway Company.

Wm. M. Franklin, Clerk Supreme Court of Oklahoma, by  
Reuel Haskell, Jr., Assistant. (Seal of Supreme Court,  
State of Oklahoma.)

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[fol. 2] CITATION—In usual form, showing service on E. S. Ratliff et al.; filed Oct. 21, 1924; omitted in printing

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[fol. 3] [File endorsement omitted]

**IN SUPREME COURT OF OKLAHOMA**

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, and UNITED STATES Fidelity and Guaranty Company, Appellants and Plaintiffs in Error,

versus

THE STATE OF OKLAHOMA and THE CITY OF McALESTER, OKLAHOMA, Appellees and Defendants in Error

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed Oct. 21, 1924

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Oklahoma in rendering judgment

against them in the above entitled case affirming the order of the Corporation Commission appealed from therein, the appellants and plaintiffs in error hereby pray a writ of error from said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas and cost bond and appellants and plaintiffs in error present herewith their assignments of error and pray that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

Joseph M. Bryson, Maurice D. Green, Howard L. Smith, Attorneys for Appellants and Plaintiffs in Error.

STATE OF OKLAHOMA,  
Supreme Court, ss:

Allowed: let the writ of error issue upon the execution and filing of a bond by the appellants and plaintiffs in error to the appellees and defendants in error in the sum of 1,000.00 (\$1,000.00) Dollars, such bond, when approved, to act as a supersedeas and cost bond.

Dated this 21 day of October, 1924.

N. E. McNeill, Chief Justice of the Supreme Court of the State of Oklahoma.

Attest: Wm. M. Franklin, Clerk Supreme Court, Okla., by Reuel Haskell, Jr., Asst. (Seal of Supreme Court, State of Oklahoma.)

[fol. 4]

[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

WRIT OF ERROR—Filed Oct. 21, 1924

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you or some of you being the highest court of law or equity in said State, in which a decision could be had in said suit between Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, as appellants and plaintiffs in error, and the State of Oklahoma and the City of McAlester, Oklahoma, as appellees and defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of and being repugnant to the Constitution, Treaties, or Laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of said Missouri, Kan-

sas & Texas Railway Company and United States Fidelity and Guaranty Company, appellants and plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

[fol. 5] Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States this 21 day of October, in the year of our Lord, one thousand nine hundred twenty-four.

Harry L. Finley, Clerk of the District Court of the United States for the Western District of the State of Oklahoma.  
(Seal of the United States District Court, Western District of Oklahoma.)

Allowed October 21, 1924, by N. E. McNeill, Chief Justice of the Supreme Court of the State of Oklahoma.

Attest: Wm. M. Franklin, Clerk Supreme Court, Okla., by Reuel Haskell, Jr., Asst. (Seal of Supreme Court, State of Oklahoma.)

[fol. 6]

[File endorsement omitted]

#### IN SUPREME COURT OF OKLAHOMA

[Title omitted]

#### ASSIGNMENTS OF ERROR—Filed Oct. 21, 1924

Come now the Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, plaintiffs in error in the above entitled cause, and ever and show that in the foregoing record and proceedings in said cause, there is manifest error in the action and rulings of the Corporation Commission of Oklahoma and the Supreme Court of the State of Oklahoma in this, to-wit:

#### I

The Corporation Commission of Oklahoma and the Supreme Court of Oklahoma had no jurisdiction or authority to impose upon the plaintiffs in error any requirements or condition other than or different from those contained in the Ordinance No. 74, passed and ap-

proved November 8, 1901, constituting the contract between the City of McAlester, Oklahoma and these plaintiffs in error, by which contract it was provided, among other things, that if at any time in the future the said City of McAlester should desire to open and establish a crossing of Comanche Avenue across the right of way and station grounds of the plaintiffs in error that it might do so by an undergrade crossing under the main and other tracks of said plaintiffs in error located upon their fill and above the then existing grade of said Comanche Avenue, and by a grade crossing over any side track of these plaintiffs in error then existing, or thereafter established, said crossing to be constructed upon plans and specifications to be approved by the plaintiffs in error and at the sole cost and expense of the said City of McAlester, the said plaintiffs in error agreeing, in consideration thereof and in consideration of the other matters and things expressed in said ordinance, to waive any and all claims for damages because of the opening and establishing of said crossing, and the Supreme Court of Oklahoma erred in affirming the order of the Corporation Commission of Oklahoma of June 16, 1922, and denying plaintiffs in error's petition for rehearing, by which order of the [fol. 7] Corporation Commission said plaintiff in error Railway Company was ordered and directed to prepare a plan for an undergrade crossing of Comanche Avenue over its premises as prayed for by said City of McAlester, and as stated in said order, together with an estimated cost showing quantities, same to be filed with the Mayor of said City and with the Corporation Commission within a specified time, as stated in said order; and by which order said plaintiff in error Railway Company was further ordered and directed to undertake to agree with said City of McAlester on an apportionment of the cost of constructing said undergrade crossing and on failure to agree, to report back to said Corporation Commission for hearing of further evidence covering a division between said Railway Company and said City of the cost thereof; and by which said order said plaintiff in error Railway Company was ordered and directed to have said undergrade crossing constructed and opened for traffic within ninety days from the date said City of McAlester should arrange to pay its proportionate part of the cost of constructing the same; the said order and the said decision of the Supreme Court in affirming same and denying plaintiffs in error a rehearing constituting a taking of these plaintiffs in error's property without due process of law, and without compensation, and denying to them the equal protection of the law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

## II

The Corporation Commission of Oklahoma and the Supreme Court of Oklahoma had no jurisdiction or authority to impose upon the plaintiffs in error any requirements or condition other than or different from those contained in the Ordinance No. 74, passed and approved November 8, 1901, constituting the contract between the City of McAlester, Oklahoma, and these plaintiffs in error, by which contract it was provided, among other things, that if at any time in the

future the said City of McAlester should desire to open and establish a crossing of Comanche Avenue across the right of way and station grounds of the plaintiff in error Railway Company, that it might do so by an undergrade crossing under the main and other tracks of said plaintiff in error located upon its fill and above the then existing grade of said Comanche Avenue, and by a grade crossing over any side track of these plaintiffs in error then existing, or thereafter established, said crossing to be constructed upon plans and specifications to be approved by the plaintiffs in error and at the sole cost and expense of the said City of McAlester, the said plaintiffs in error agreeing, in consideration thereof, and in consideration of the other matters and things expressed in said ordinance, to waive any and all claims for damages because of the opening and establishing of said crossing, and the Supreme Court of Oklahoma erred in affirming the order of the Corporation Commission of June 16, 1922, and denying plaintiffs in error's petition for a rehearing, by which order of the Corporation Commission said plaintiff in error Railway Company was ordered and directed to prepare a plan for an undergrade crossing of Comanche Avenue over its premises as prayed for by the said City of McAlester, and as stated in said order, together with an estimated cost showing quantities, same to be filed with the Mayor of said City and with the Corporation Commission within a specified time, as stated in said order; and by which order said plaintiff in error Railway Company was further ordered and directed to undertake to agree with said City of McAlester on an apportionment of the cost of constructing said undergrade crossing and on failure to agree, to report back to said Corporation Commission for hearing of further evidence covering a division between said Railway Company and said City of the cost thereof; and by which said order said plaintiff in error Railway Company was ordered and directed to have said undergrade crossing constructed and opened for traffic within ninety days from the date said City of McAlester should arrange to pay its proportionate part of the cost of constructing the same; said order and the decision of the Supreme Court in affirming same and denying plaintiffs in error a rehearing resulting in a denial to these plaintiffs in error of the right of contract, and impairing the obligations of contracts, in violation of Section 10, of Article I of the Constitution of the United States of America.

### III

The Supreme Court of Oklahoma erred in upholding and affirming the order of the Corporation Commission of Oklahoma on the ground that said Commission had authority and jurisdiction to make said order under the provisions of Sections 3491 to 3497, both inclusive of the Compiled Oklahoma Statutes of 1921, and in holding the said statutes to be valid and Constitutional, the validity of said sections and the jurisdiction and authority exercised thereunder by the Corporation Commission and the Supreme Court in this cause having been drawn in question by these plaintiffs in error on the ground of their being repugnant to the Constitution of the United States and in contravention thereof, in that they result in the taking

of these plaintiffs in error's property without due process of law and without compensation, and denied to them the equal protection of the law, in violation of the Fifth and Fourteenth Amendment to the Constitution of the United States, and deny to them the right of contract, and impair the obligation of contracts, in violation of Section 10 of Article I of the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, the said Missouri, Kansas & Texas Railway Company and United States Fidelity & Guaranty Company, plaintiffs in error, pray that the said judgment of the Supreme Court of the State of Oklahoma be reversed, set aside and held for naught, and that judgment be rendered for these plaintiffs in error, granting to them their rights under the Constitution and laws of the United States, and for their costs.

Joseph M. Bryson, Maurice D. Green, Howard L. Smith, Attorneys for Plaintiffs in Error.

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[fols. 10 & 11] SUPERSEDEAS AND COST BOND ON WRIT OF ERROR FOR \$1,000—Approved and filed Oct. 23, 1924; omitted in printing

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[fols. 12 & 13] [File endorsement omitted]

#### IN SUPREME COURT OF OKLAHOMA

[Title omitted]

#### PRECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Supreme Court of the State of Oklahoma:

You are requested to at once prepare a complete copy of the record in the above entitled and numbered cause, including copies of all papers filed and all proceedings had in the Supreme Court of the State of Oklahoma, together with the opinion of the court and the petition for rehearing of appellants and plaintiffs in error herein, and the order overruling same, in compliance with the writ of error from the United States Supreme Court heretofore filed herein.

Joseph M. Bryson, Maurice D. Green, Howard L. Smith,  
Attorneys for Appellants and Plaintiffs in Error.

STATE OF OKLAHOMA,  
Oklahoma County, ss:

Service of the above and foregoing præcipe for record and receipt of a copy thereof is hereby acknowledged this 21st day of October, 1924.

E. S. Ratliff, Atty. for Corp. Com., Attorneys of Record for Appellee and Defendant in Error, State of Oklahoma.

STATE OF OKLAHOMA,  
Pittsburg County, ss:

Service of the above and foregoing præcipe for record and receipt of a copy thereof is hereby acknowledged this 24th day of October, 1924.

W. J. Horton, Attorney of Record for Appellee and Defendant in Error, City of McAlester, Oklahoma.

[fol. 14] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION IN ERROR—Filed Nov. 27, 1922

The said appellant above named alleges and shows to this Honorable Court that on the 16th day of June, 1922, the appellees herein obtained a final judgment and order against this appellant before the Corporation Commission of the State of Oklahoma by the consideration of said Commission in a certain action pending before it, wherein said appellees were complainants and this appellant was defendant by the terms and provisions of which final order and judgment this appellant was ordered, directed and required by said Commission to prepare a plan for a subway crossing of Comanche Avenue under and across appellant's premises at McAlester, Oklahoma, as prayed for by appellees, together with an estimate of the costs thereof and appellant and the City of McAlester were ordered to undertake to agree on an apportionment of the costs thereof and appellant was required to have said underhead crossing completed and opened for traffic within ninety (90) days from the date the said City of McAlester had arranged to pay its portion of the costs, notwithstanding the fact that the right to effect such an extension of Comanche Avenue under and across appellant's premises has never yet been secured by condemnation proceedings, or otherwise, except that by contract Ordinance No. 74 of the City of McAlester, passed and approved on November 8th, 1901, it is provided that if said Avenue should ever be opened and established across appellant's premises, it would be done by an underhead crossing under the main track and a grade crossing over the side tracks of appellant on plans to be approved by it, but at the sole costs and expense of the City of McAlester, and also notwithstanding the fact that there is [fol. 15] now no reasonable necessity for said crossing; the original case-made and transcript of the record of which said judgment, order and proceeding had in said cause, together with the further order of the said Corporation Commission denying appellant's application for a supersedeas is attached hereto and made a part of this petition in error, and appellant alleges and states that there is error in said judgment, order and proceedings in this, to-wit:



That the Corporation Commission of Oklahoma had no jurisdiction over such proceedings or to make the order complained of.

That the Corporation Commission of Oklahoma had no jurisdiction to require the opening and establishment of Comanche Avenue over appellant's premises in the absence of any right by condemnation proceedings, or otherwise, having been required to do so.

The Corporation Commission of Oklahoma had no jurisdiction to impose upon appellant any requirements or conditions other than, or different from, those agreed to in contract Ordinance No. 74 of the City of McAlester, passed and approved on November 8th, 1901.

The Corporation Commission of Oklahoma erred in ignoring and treating as null and void and of no effect, the said contract between the City of McAlester and appellant as represented by said Ordinance No 74.

The order of the Corporation Commission results in a taking of appellant's property without due process of law and without compensation and denies it the equal protection of the law in violation of the fifth and fourteenth (5th & 14th) Amendments to the Constitution of the United States, and of Sections seven and twenty-four, Article two of the Constitution of the State of Oklahoma.

[fol. 16]

—

The order of the Corporation Commission denies to appellant the right of contract and impairs the obligation of contracts, in violation of Section Ten of Article One of the Constitution of the United States and in violation of the Constitution of the State of Oklahoma.

The order of the Corporation Commission is unreasonable and unjust and an abuse of discretion on the part of the Commission.

The order of the Corporation Commission is unreasonable and unjust in that there is no showing of any necessity for the crossing in question.

The Corporation Commission erred in refusing to permit appellant in error to supersede the order of the Commission, pending this appeal, and the right to supersede said order is guaranteed by the Constitution of Oklahoma and is not subject to the discretion of the Commission.

Wherefore appellant prays that this Court review said order and proceedings and each and every one of the assignments herein and that said assignments be sustained and that said orders and proceedings be vacated and set aside and held for naught and reversed and that judgment may be rendered in favor of appellant and that such further orders and judgments be rendered in said cause as to this Court may seem proper and that appellant be restored to all the rights which it has lost.

M. D. Green and H. L. Smith, Attorneys for Appellant.

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[fol. 17] [File endorsement omitted.]

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

Cause No. 4410

THE INCORPORATED CITY OF McALESTER, OKLAHOMA, Petitioner,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and CHAS. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company, Respondents.

**Case Made**—Filed in Supreme Court Nov. 27, 1922.

[Caption omitted]

[fol. 18]

[Title omitted]

APPLICATION FOR ORDER TO CONSTRUCT PUBLIC HIGHWAY CROSS-  
ING—Filed Nov. 27, 1922

Comes now the Incorporated City of McAlester, Oklahoma, petitioner herein, and complaining of the Missouri, Kansas & Texas Railway Company and Chas. E. Schaff as its receiver operating its properties, respondents, says:

That the petitioner, the incorporated city of McAlester, Oklahoma, is a municipal corporation and a city of the first class organized as such under the laws of the state of Oklahoma and laid

out into city blocks, lots, streets and alleys according to the official map and plat thereof approved by the Acting Secretary of the Interior, February 14, 1901, under authority of the laws of the United States; that it is also divided into six wards numbered First, Second, Third, Fourth, Fifth and Sixth Wards, with city public schools in each ward and a high school in the First Ward; that it has a population of over — inhabitants, with residence and wholesale and retail business districts; with railroads and union passenger and freight depots, street car lines and interurban lines.

That Comanche Avenue is one of the public streets and highways [fol. 19] of said City of McAlester appearing on said map and plat of said city and extends in an east and west direction from the Second Ward to the Third Ward of said city, and that the city public school of the Third Ward is located thereon, and that the Second and Third Wards contain a large population rendering free and unobstructed passageway along said Comanche Avenue highly necessary to the convenience and necessities of the residents of said Wards and of said city.

That the said Missouri, Kansas & Texas Railway Company is a steam railway, and that said Chas. E. Schaff is the Receiver of its properties operating the same, and that the said steam railway in passing through the city in a north and south direction separates the Second Ward, lying on its east, from the Third Ward, lying on the west line thereof, and that said Comanche Avenue crosses the right of way of said railway company, but that at the point of its intersection therewith there exists a very high embankment, upon the top of which is situated the tracks and road bed of the said railway line, by reason whereof said Comanche Avenue is completely closed and obstructed at said point.

That the City Council of the said city of McAlester, Oklahoma, on September 19, 1921, enacted and passed a resolution declaring the necessity for a crossing upon, over or under the track, road bed and right of way of said Missouri, Kansas & Texas Railway Company where said Comanche Avenue intersects therewith, and by said resolution directed that application be made to said Corporation Commission for an order requiring said Missouri, Kansas & Texas Railway Company and said Chas. E. Schaff, its Receiver operating its properties, to construct and maintain a public highway crossing at said intersection, a copy of said resolution being hereto attached [fol 20] and made a part hereof and marked Exhibit "A."

Wherefore, the premises considered, the petitioner, the Incorporated City of McAlester, Oklahoma, prays that an order be made and entered by the Corporation Commission requiring said Missouri, Kansas & Texas Railway Company and its said Receiver, Chas. E. Schaff, to construct and maintain at its and his cost and expense a public highway crossing at the said intersection of said Comanche Avenue with said steam railway company in such manner as to open the same for passageway and travel by pedestrians and vehicles along and over said Comanche Avenue.

The Incorporated City of McAlester, Oklahoma, by W. J. Horton, City Attorney, and E. M. Fry, City Manager.

[fol. 21]

## Resolution

Whereas, Comanche Avenue is one of the public highways and streets of the Incorporated City of McAlester, Oklahoma, and one of the main thoroughfares and highways connecting and between the Second and Third Wards of said city, each of said wards containing a large population, and having located in each of them public schools of the city, the public school of the Third Ward being located on said Comanche Avenue, and the said Comanche Avenue running through the central portions of said Second and Third Wards; and, whereas, there exists at the intersection of said Comanche Avenue and the roadbed, tracks and right of way of the Missouri, Kansas & Texas Railway Company, a steam railway company, a very high embankment which completely obstructs passageway along said Comanche Avenue between the said Second and Third Wards and many other portions of said city, thereby greatly impeding the travel in said city and access of citizen to and from different points therein and communication with each other, and retarding the improvement and development of said city; and, whereas, by reason of the premises a public necessity exists for a crossing upon, over or under the said track, roadbed and right of way of said Missouri, Kansas & Texas Railway Company where said Comanche Avenue intersects therewith—

Now, therefore, be it resolved by the Mayor and City Council of the City of McAlester, Oklahoma, that the said City of McAlester make application to the Corporation Commission of the State of Oklahoma for an order requiring said Missouri, Kansas & Texas Railway Company and Chas. E. Schaff, its Receiver operating its properties, to construct and maintain a public highway crossing at [fol. 22] the intersection of Comanche Avenue with the tracks of said railway company as aforesaid; and that the City Manager and the City Attorney of said city are hereby directed, authorized and empowered to, for and in the name of said city to make such application to said Corporation Commission and to do all acts and things necessary and proper in and about the presentation and prosecution of said application.

Passed and approved this 19th day of September, 1921.

P. K. Pemberton, Mayor.

Attest: Rose D. Ewens, City Clerk. (Seal.)

Exhibit "A."

Endorsements as follows: In the Matter of Application for Order to Construct Public Highway Crossing. (Note by Reporter:) No filing date shown on petition.

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[fol. 23] ORDER SETTING CAUSE AND NOTICE THEREOF

And, thereafter, to-wit: On the 4th day of October, 1921, the Commission set said cause down for hearing on the First day of Novem-

ber, 1921, at ten o'clock A. M., due and proper notice being given to all interested parties by the Commission, said notices being in the words and figures as follows, to-wit:

[fol. 24]

Cause No. 4410

October 4, 1921.

Mr. M. D. Green, Gen. Atty. M., K. & T. Railway Company, Muskogee, Oklahoma.

DEAR SIR: Enclosed herewith find copy of application of the City of McAlester for an order requiring the M., K. & T. Railway Company to construct a public highway crossing at Comanche Avenue in the City of McAlester.

This is to advise that the matter has been docketed under the above cause number and set for hearing in Commission's Court Room, Oklahoma City, at ten o'clock A. M., November 1, 1921.

Very truly yours, ———, Chairman. C. N.

cc: Mr. Chas. E. Schaff, Rec'r M., K. & T. Railway Co., St. Louis, Missouri.

[fol. 25]

NOTICES OF RESETTING CAUSE

And thereafter said cause was continued from November 1, 1921 to April 14th, 1922, due notice being given all parties interested, said notices being in the words and figures following:

[fol. 26]

Cause No. 4410

April 3rd, 1922.

E. M. Fry, City Manager McAlester, Oklahoma; W. J. Horgon, City Attorney McAlester, Oklahoma.

GENTLEMEN: In re application of the City of McAlester for an order requiring the M., K. & T. Ry. Co., to construct a public highway crossing at Comanche Avenue in the City of McAlester.

You are advised that the above matter has this day been re-set for hearing at ten o'clock A. M. April 14th, 1922, at McAlester, Oklahoma.

Very truly yours, ———, Secretary. GFS.e.

[fol. 27]

Cause No. 4410.

April 3rd, 1922.

M. D. Green, Gen'l Atty. M., K. & T. Ry. Co., Muskogee, Oklahoma; Chas. E. Schaff, Receiver M., K. & T. Ry. Co., St. Louis, Mo.

GENTLEMEN: This is to notify you that Cause No. 4410 application of the City of McAlester for an order to construct a public highway crossing at Comanche Avenue in the City of McAlester, Okla-

homa, has this day been re-set for hearing on April 14th, 1922, at McAlester, Oklahoma.

Please take note and be governed accordingly.

Very truly yours, — — —, Secretary. GFS—c.

[fol. 28] And thereafter said cause was again continued from April 14th, 1922, until May 10th, 1922; due notices being given to all parties interested as appear from the following notices in the words and figures as follows:

[fols. 29 & 30]

May 4, 1922.

Mr. R. M. Frye, City Manager, McAlester, Oklahoma.

DEAR SIR: This is to notify you the Commission has this date reset Cause #4410 for hearing at 10 o'clock A. M. on May 10th at McAlester, Oklahoma.

Please take note and govern yourself accordingly.

Yours truly, — — —, Chairman. GFS:T.

cc.—W. J. Horton, City Attorney, McAlester, Oklahoma.

[fol. 31] Chairman Russell: Are we ready to proceed, Judge?

Mr. Horton: Yes, as soon as the city clerk brings the ordinance in.

Chairman Russell: All witnesses who will testify in this case might stand up and be sworn.

(Witnesses sworn.)

Chairman Russell: Call your first witness.

ROSE D. EWENS, called as a witness on behalf of the City of McAlester, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Horton:

Q. You may state your name?

A. Rose D. Ewens.

Q. What official office, if any, do you hold in connection with the City of McAlester?

A. City Clerk.

Q. As such you are the recorder of the ordinances passed by the City Council of the incorporated city of McAlester, Oklahoma, and have them in your custody?

A. I have.

Q. Do the city records show the passage of an ordinance on September 19, 1921, with reference to a crossing over the road bed and right-of-way of the Missouri, Kansas & Texas Railway Company at Comanche Avenue in said city?

A. Yes sir, a resolution passed on that date.

Q. Have you the resolution before you,—a record of it?

A. I have.

[fol. 32] Q. Will you please read the resolution?

Chairman Russell: You have a copy of it Judge, for the Reporter?

Mr. Horton: We will introduce the copy of it.

Mr. Green: I would like to enter an objection to the introduction of the resolution for the reason that it purports to state that Comanche Avenue is already an existing street over the railway premises, which is not a fact.

Chairman Russell: Well, that might be shown by testimony not to be a fact, but as it is a resolution of the City Council it will be admitted for what it shows and if it does not show the facts, it can be corrected by rebuttal testimony.

Mr. Green: Our objection goes to this: That you couldn't put the burden of proof on us by introducing a resolution passed at a time when we were not present, and, so far as I know, passed without any investigation or without any facts before them to determine whether there is a street over the railway premises. We don't deny there is a street west of the railway premises, also east, but our position is, there never has been such a street over the railway premises at that point. We don't want to admit that.

Chairman Russell: The Commission will recognize there is no street over the railway at that point.

Mr. Green: If the Chairman please, I didn't mean to simply confine my objection to the fact there is no physical driveway existing [fols. 33 & 34] there, but as a legal proposition there never has been a street opened there by combination, agreement or any other procedure by which a street was opened over the railway premises. This railroad was built in the 70's under a land grant of Congress.

Chairman Russell: The resolution will be admitted and your exceptions will be noted.

Mr. Green: Note the exception.

Chairman Russell: And it will be subject to any rebuttal that may want to be offered.

Mr. Horton: If the Commission please, we will supply to the Reporter a copy of this resolution as a part of the record in the case.

Chairman Russell: That will be sufficient.

Mr. Horton: That is all with this witness. Mr. Fry take the stand.

(Witness excused.)

Said Exhibit "A" having been offered and received in evidence, a true, correct and complete copy of the same will be found on Page No. 113 of this record. Same being attached to Plaintiff's Petition in this Cause.



E. M. Fry, called as a witness on behalf of the City of McAlester, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Horton:

Q. Your name is E. M. Fry?

A. Yes sir.

Q. The City of McAlester has a managerial form of Government and you are the Manager of the incorporated city of McAlester?

A. Yes sir.

[fol. 35] Q. The City Council of the City of McAlester on September 19, 1921, enacted and passed a resolution declaring the necessity for a crossing over and upon or under the right-of-way and road bed of the Missouri, Kansas & Texas Railway Company at Comanche Avenue and authorized and directed you as City Manager to apply to the Corporation Commission for an order providing for such crossing?

A. Yes sir.

Q. It is under authority of that resolution that this proceeding has been brought?

A. Yes sir.

Q. What is the approximate,—the City of McAlester is a city of the first class?

A. Yes sir, it is.

Q. What is its population, approximately?

A. Fifteen thousand, approximately.

Q. It consists of how many wards?

A. Six Wards.

Q. How does the M., K. & T. railway run through the town, from north to south or east to west?

A. It runs from north to south.

Q. It bisects the city into two parts?

A. Yes sir.

Q. Which wards lay on the east of the M., K. & T. Railway?

A. On the east of the railway?

Q. Yes sir.

A. The first, second and fifth.

Q. Which wards lay on the west of the M., K. & T. Railway?

A. The Third, fourth and fifth,—the sixth is on the east.

Q. The city is traversed also by the Chicago, Rock Island and [fol. 36] Pacific Railway?

A. It is.

Q. And it runs east and west?

A. Yes sir.

Q. Which wards lay on the north of the C., R. I. & P. Railway?

A. The first, fourth, fifth and sixth.

Q. And which on the south side?

A. The second and third wards lay on the south side.

Q. What is the relative position of the second ward to any other ward in the city?

A. The second ward is the largest ward in the city in point of population. I haven't the data as to the population of the city by wards.

Mr. Thompson: Could you give us your vote by wards?

A. I could get it for you.

Mr. Thompson: All right.

Mr. Thompson: Do you intend to introduce this map?

(Indicating map laying on the table.)

Mr. Horton: We probably will. Have you a map, a recognized map of the city of McAlester?

A. I have.

Q. That map was prepared by or under what authority and as of what date?

A. It is a copy of a map of the Secretary of the Interior, it shows the Surveyor's mark, "Kirkpatrick." It is an official map of the Department of the Interior, it hasn't a certificate on here though.

Q. It is approved by the Secretary of the Interior as of February 14, 1901?

A. No, that isn't it. The date is on there but there is no—

[fol. 37] Q. That is a copy of the map the same as is in general use in the transfer of property and recognized as a correct copy of the official map of the City of McAlester?

A. Yes sir.

Q. We offer copy of this map in evidence and ask to mark it (Interrupted).

Chairman Russell: It will be admitted and marked by the Reporter.

Q. (Attorney continuing:) —as Petitioner's Exhibit "B" and we will identify copy of the ordinance as Petitioner's Exhibit "A."

Chairman Russell: Wards five and six are what constitutes the old town?

Mr. Horton: The Exhibit "B" is a map of that part of the City of McAlester which was formerly the incorporated city of South McAlester as laid out by the Townsite Commissioner and approved by the Secretary of the Interior February 14, 1901, and embraces wards one, two, three and four of the present city. This map does not embrace wards five and six of the city?

A. No.

Q. That was formerly known as the incorporated city of McAlester, now referred to as North McAlester by way of proper designation? (Interrupted.)

A. It has been consolidated.

Q. (Continuing:) And by Act of Congress since that time, the two have been consolidated into one city?

A. Yes sir.

Q. Have you a map of that part known as North McAlester before you?

[fol. 38] A. I have.

Q. The Petitioners ask leave to have this map of North McAlester, that is the fifth and sixth wards, identified as Petitioner's Exhibit "C" and offer the same in evidence.

(Map so identified by the Reporter for identification.)

A. Exhibit "C" is a copy of the original map as certified to the Secretary of the Interior with the exception of changes in the names of certain streets, which are noted thereon; some of the names of the streets were similar to those in South McAlester and they changed, that is the only difference.

Q. I hand you a statement of the last municipal election held on April 4, 1922. I will ask you to examine that and state if that is a correct statement of the vote?

A. It is correct, as I remember it.

Q. Please give that in figures?

A. For each ward?

Q. Yes.

A. First Ward 588; Second Ward 932; Third Ward 345; Fourth Ward 595; Fifth Ward 166; Sixth Ward 277.

Q. Mr. Fry, there are public schools in each one of these wards?

A. Yes sir.

Q. Where is the high school of the city located?

A. The high school of the city is located in the first ward.

Q. The high school has pupils from each ward in the city has it?

A. Yes sir.

Q. Upon what street is the high school in the third ward located?

A. You mean the public school?

[fol. 39] A. I mean in the third ward.

A. It is located on Comanche Avenue. Do you want the other streets,—it occupies a block?

Q. Yes

A. (No response.)

Q. Where are the main business streets or places where merchants transact business and the people buy and trade, where is that located?

A. Most of those are in the first and second wards.

Q. Are there any stores at all in the third ward?

A. Not very many, there are some suburban stores there,—a few.

Q. What sort are they?

A. Neighborhood grocery stores,—I think there are two or three.

Q. They are very small?

A. Yes sir, they are very small.

Q. And only patronized by those in the surrounding blocks?

A. I think so, yes.

Q. And only sell groceries and such supplies as are used for daily consumption?

A. Yes sir, I think so.

Q. Where is the railway depot, both freight and passenger located?

A. They are on the east side of the M., K. & T. railway tracks. The passenger depot is in the second ward and the freight depot is in the first ward, I believe.

Q. The Rock Island freight depot is further up north?

A. In the second ward.

[fol. 40] Q. From the junction of the Katy and the Rock Island those are also in the second ward?

A. Yes sir.

Q. Is there a church located in the third ward?

A. I think there is a Cumberland Presbyterian Church in the third ward. It is a small church, I don't know whether they hold services there or not,—there is a building there.

Q. It has had in former years a scant membership but you don't know now whether it is—(Interrupted.)

A. I don't know whether they conduct services there now or not.

Q. Where is the main Presbyterian church of the city located?

A. In the second ward.

Q. I believe, also, there may be a Presbyterian church in the sixth ward up in old town, accommodating the people in what is known as north McAlester?

A. Yes sir.

Q. Is there a Baptist church in the city?

A. Yes sir.

Q. Where is it located?

A. It is located in the first ward.

Q. Is it your understanding that it has a large percentage of membership residing in the third ward?

A. I think so, I am not familiar with that however.

Q. Where is the Methodist church located?

A. It is located in the fourth ward.

Q. That is what is known as the South Methodist Church?

A. Yes and there is another Methodist Church located in the fifth ward and another in the first ward.

[fol. 41] Q. The main Methodist church, that is the Methodist Church North, is located in the first ward, is it not?

A. Yes sir.

Q. The Episcopalian is in the first ward?

A. Yes sir.

Q. And the Catholic church, also?

A. Yes.

Q. There is a Catholic school in the first ward, also, I believe?

A. Yes sir.

Chairman Russell: In the absence of any evidence to the contrary, the Commission will take notice of the custom of people to mingle to and fro in cities like this and attend all these institutions and their business as well.

Mr. Horton: That being the case, that would relieve us of making formal proof of any of those instances.

Q. Mr. Fry, I wish you would turn to Exhibit "B" and point out on there what streets south of the Rock Island railway there is any public crossings over the M., K. & T. railway?

A. The first crossing south of the Rock Island Railway is at Cherokee Avenue.

Q. How far south of the railway depot, the union depot that is there?

A. It is just one block.

Q. Then, where is the next crossing south of that?

A. The next crossing south of that is on Delaware.

Q. How far south is that?

A. That is 435 feet south of Cherokee.

[fol. 42] Q. Just one block?

A. It is a block and a half, the way the town is laid out it is 436 feet south of the crossing on Cherokee.

Q. At Delaware is the place where the "town branch," the main open storm sewers of the city passes?

A. Yes, the canal.

Q. What facilities are there for travel, for passing of travel, for people in cars or wagons or other vehicles at Delaware?

A. There are very poor facilities there. It is a narrow crossing under there,—I presume it is not over 20 feet. I don't remember of ever measuring it.

Q. It is not situated so they could very well pave it?

A. No.

Q. I believe this town canal pursues generally that course of Delaware street, clear down to the fourth ward?

A. Yes, in a general way it does.

Q. There has to be an under grade crossing or culvert or some other way, merely for the water to pass through there?

A. Yes sir.

Q. Then passing on south from Delaware, where is the next crossing?

A. The next crossing is at Ottawa Avenue, a distance of 1,569 feet.

Q. Is that an over-head or an under grade crossing?

A. That is a grade crossing.

Q. How many blocks and streets intervene between Delaware and Ottawa?

A. Four streets,—three between, that is right,—No, four is correct.

[fol. 43] Q. And that is a distance of—

A. 1,569½ feet.

Q. Then residents of any part of the third ward who reside south of Comanche Avenue must either go north to the grade crossing some 1,500 feet at Ottawa or else go north, either to the inadequate crossing at Delaware or passing still further north to Cherokee in order to go back and forth between those, in order to gain exit from the third ward?

A. Yes.

Q. That naturally results in a good deal of inconvenience and extra travel to those who desire to make such trips?

A. Yes, it necessarily would.

Q. Comanche Avenue, both on the east side and on the west side of the M., K. & T. has been built up into a regular residence street and occupied by residences in its proportionate part of the population of the second and third wards?

A. Yes, Comanche street is a residence street on both sides of the M., K. & T. right-of-way.

Q. Comanche Avenue then is inhabited and open through and through on both the east and the west sides of the M., K. & T. Railway?

A. It is, yes.

Q. There are no lines of projections showing a street across the railway?

A. There are no lines of projection in any part of the city.

Mr. Green: Do you contend that Comanche Avenue exists as a regular street across the railway premises.

Mr. Horton: Yes, we do. All it needs, just like any other street in [fol. 44] any other city is an opening there in order to connect the two ends of the streets. In other words, the removal of the obstruction would make it an open street both ways, that is what we are seeking in this matter.

Chairman Russell: The city's contention is that it should be an open street?

A. Yes sir.

Chairman Russell: But you would contend it never has been a traveled street?

A. No we don't contend that.

Mr. Green: Do you contend that by any authority of law it has ever been designated as a street on the railway premises?

Mr. Horton: Nothing further than is shown by the map and plat which was prepared under the Act of Congress of June, 1898, and the streets which have been laid out and by our passage of which is crossed only in part by obstructions of the railway and which the statutes of the State provide may be opened so as to make them open and traversable.

Mr. Green: By referring to the maps, you mean those you have introduced in evidence?

Mr. Horton: Yes sir.

Mr. Green: To make myself more clear. The law provides whenever a street or highway is opened through private property, whether a railroad or a farm, that company is entitled to compensation.—Now you don't contend it was ever lawfully opened over the railway premises,—the question of how much damage is another matter. [fol. 45] Mr. Horton: This is not a condemnation proceeding. This city has been laid out legally by an Act of Congress and the streets have been set out and Comanche Avenue has been brought up to the railway and the railway there forms an obstruction to the free passage way through and through on Comanche Avenue and under authority of the statutes of the State of Oklahoma it should be opened so as to make it a continuous thoroughfare.

Mr. Green: You say the railway forms an obstruction on Comanche Avenue. Now do you contend Comanche Avenue exists as a legal street on the railroad premises?

Mr. Horton: Yes sir.

Mr. Green: By what authority?

Mr. Horton: By authority of the Act of Congress for laying those streets out. There are no lines of projection on the streets coming across the railway, either the Rock Island or the M. K. & T. but they should be projected across, they are supposed to run across.

Chairman Russell: The record will show very clearly what the various conditions along that line are. If the passage way is needed by the public, it should be opened, if it was already opened and not needed, it should be closed. I think there is authority for both, whichever the Commission may think is justified.

Mr. Horton: In order to make our position clear and I am sure it would be quite well understood by the Commission. The passage of the law under which we are proceeding contemplated just such conditions and provides the opening should be made and that is [fol. 46] the theory upon which we are proceeding.

Mr. Green: Of course, we can not agree to that. I just want to, without being tedious, say this much additional. We are just as much entitled to compensation for land taken for opening of streets and elements of damage as would be a farmer, and, before the 1919 law was passed, giving this Court exclusive jurisdiction over crossings, there was two or three opinions from our Supreme Court that there was no power to establish a crossing where there was none. This Commission was given by the 1919 law power to prescribe the place and necessity for a crossing, but, if there then exist no legal crossing they would have to condemn the crossing just like they would with any other property owner, unless we consent under the terms that may be made in the Commission's order.

Chairman Russell: I am sure the Commission understands the view point of both parties.

Mr. Green: We met with that same condition in the 1916 law which gives the Corporation Commission exclusive authority to order such crossing and does not provide——

Chairman Russell: We will get the facts necessary for the crossing and the demand for its use.

Mr. Horton: The statutes do not provide for condemnation proceedings.

Q. Then, in the third ward, there is no substantial number of people living south of Miami in the third ward?

A. No.

Q. So that these crossings enumerated in your testimony lying [fol. 47] south of the Union Depot cover all that part of the third ward that would be affected by this here in any way?

A. Yes.

Q. Now then, taking the other end, the north directions from the Union Depot, which is at the crossing of the Katy and Rock Island,



please state what crossings have been opened or exist north of the Union Depot?

A. 1173.6 feet north of Cherokee Avenue, which is the northernly crossing in the third ward, there is an over-head crossing at Grand Avenue.

Q. That is known as the Katy viaduct isn't it?

A. Yes. A distance north of that of 2129.8 feet there is a grade crossing at Monroe.

Q. What streets exist between Monroe and Grand?

A. You just want the number and not the names?

Q. Yes, you might give the names?

A. Washington, Adams, Jefferson and Madison.

Q. What is the next crossing open to travel north of Monroe?

A. The next crossing north of Monroe is a distance of 5983.7 feet to Stonewall Avenue,—over a mile.

Q. Mr. Fry, as City Manager, you are constantly going to and fro all over the city, are you not?

A. Yes.

Q. And you have constantly called to your attention the needs and wants of the people with reference to intercourse of travel?

A. Yes.

Q. And all those things which make up the existence of a people of a municipality?

A. Yes.

[fol. 48] Q. State whether or not, in your judgment, there is a necessity,—a public necessity for a crossing at Comanche Avenue as prayed for in this petition?

Mr. Green: I object to that as a conclusion and it would be in the province of the Commission to determine those questions.

Mr. Horton: I beg of the Court as he has stated his qualifications to answer the question and it is entitled to such weight as if it is in a jury trial.

Chairman Russell: The mere fact the city has filed this application is conclusive evidence that the representatives of the city feel that the crossing should be there, and as stated before, in the absence of direct testimony to the contrary, the Commission will take judicial knowledge of the fact that the people here do the usual amount of going to church and to fraternal societies and social functions, and, of course, to the movies and attending to business which necessitates convenient facilities for their travel to and fro over the city.

Mr. Horton: By the way Mr. Fry, where are the moving picture shows located in the city?

A. They are located in the business district or in the first ward.

Q. On Choctaw Avenue?

A. Yes.

Q. And the fraternal orders have their meetings in the first ward, do they not?

A. All that I know of.

[fols. 49-61] Mr. Horton: We offer in evidence to show by Mr. Fry, that in his judgment, after having qualified himself as competent to say that there does exist a public necessity for the opening of Comanche Avenue.

Mr. Green: We make the same objection.

Chairman Russell: The objection will be overruled.

Mr. Green: Give us an exception.

Chairman Russell: Note the exception.

A. It is my opinion the crossing should be made on Comanche Avenue.

Mr. Thompson: Mr. Fry, what arrangements has the city made, provided the city should put this crossing in, in reference to bearing a portion of the expense?

A. The city has no money set aside for it, they have made no definite arrangements. The city's fiscal year ends in June and it could be made out of next year's appropriation.

Q. It could be made then?

A. Yes.

Q. Presuming there will be a little additional ground necessary, either on the east or west, would the city be in position to acquire that?

A. I presume they would.

Q. As City Manager would you recommend it?

A. Yes, all those matters would be subject to the action of the city council.

[fol. 62] J. L. FARMER, called as witness on behalf of the City of McAlester, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Horton:

Chairman Russell: I would suggest on undisputed points that we not duplicate.

Q. State your name?

A. J. L. Farmer.

[fol. 63] Q. You live in McAlester?

A. Yes.

Q. How long have you lived in McAlester?

A. Twenty-four years.

Q. What is your occupation Mr. Farmer?

A. I am in the retail mercantile business.

Q. Where is your place of business located?

A. South main street, 203.

Q. On which side of Delaware street is your place of business?

A. I am on the north side of Delaware.

Q. How far from Delaware?

A. About four hundred feet I guess.

Q. Where do you reside?

A. I reside on Ottawa and Oak streets in the third ward.

Q. How long have you been engaged in the retail mercantile business on what is known as south main street?

A. Seventeen or eighteen years.

Q. You are thoroughly conversant with the business conditions along that street are you not Mr. Farmer?

A. I think so.

Q. Also with the crossing conditions on the various streets which lie south of the union depot?

A. Yes sir.

Q. You have served in other times as a member of the city council of the city of McAlester?

A. Yes sir, for three years.

Q. As Alderman from the third ward?

A. Yes sir.

Q. You are well acquainted with residence and property conditions of the third ward?

[fol. 64] A. Pretty well.

Q. Mr. Farmer, I wish you would, in your own way, tell the Commission what, in your judgment, are the reasons that exist for or that require or demand the opening of Comanche Avenue?

A. Well, we feel that,—I do as a citizen of the town and of the third ward that, in order to develop property of the various wards we have to have access to the town and streets and facilities to develop property. The third ward is situated on the south side of town and bordered on the north by the Rock Island and on the east by the Missouri, Kansas & Texas Railroad Company. We have been almost shut out from the city on account of the lack of grade crossings over the M. K. & T. Railroad Company. The larger portion of the city lies on east of us and we are badly in need of grade crossings over there. Our ward is developing and we feel it would develop more if we had more street crossings to connect up with the main portions of the city. When I first located in the third ward we didn't have any crossings from the third ward over the M. K. & T., and we usually had to go around through the fourth ward, and, in 1906 or '07, I asked the council to pass a resolution authorizing the opening of Cherokee Avenue. We opened Cherokee Avenue and since we opened the Avenue the property developed very fast, a- there is scarcely a 50-foot lot on Cherokee Avenue that hasn't a house on it. We opened Ottawa Avenue and Ottawa is developing. Comanche Avenue is an ideal street and would develop if we had a crossing under the railway track to give connection with the city. It is very [fol. 65] inconvenient to get to the city on Comanche Avenue. We have an inadequate grade crossing at Delaware Avenue and it is down there in the section of the city where the canal cuts it off immediately after you go through the right-of-way. You go through the south side of the canal and then the canal,—the creek runs diagonally there and the creek cuts the street in two and the main

portion is on the drain. You have no connection whatever after you go through the dump, you have to go south through the marshy soil until you come to (?) or you have to go on south on Elm Street.

Q. Is Elm Street suitable for travel?

A. It is a street that lies parallel to the railroad track there and it is not a very desirable street. You have to come down through the marshy bottom there to get to the city and you could not do it in rainy weather, in fact it is not a very safe place to travel down the right-of-way, it is not practicable to travel it at night, at all.

Mr. Hopkins: Do you suggest we ought to——

A. No, it comes through the bottom there.

Mr. Horton: I believe you said the canal runs right down through it and just leaves a fraction of Delaware on each side?

A. The canal don't follow Delaware all the way, on the east side the canal takes a bigger portion of the street, and, as a result that street is not used very much.

Q. Mr. Farmer, take weather like this, is it practicable for two cars to pass at all at that under-ground crossing at all?

A. It is not safe, I don't know if they could cross under there. It is not safe for two cars, that canal is there and there is just barely [fol. 66] width for two cars to pass.

Q. In weather where cars are liable to skid, it would be dangerous to undertake it?

A. Yes sir. When they come east on Delaware there is only space of about 12-feet there between,— \* \* \* I don't believe it is over nine or ten feet.

Q. In dry weather it requires careful driving?

A. Absolutely.

Q. Is it not true that Delaware is resorted to by people using it more as a sort of,—just an expedient and it never was designed or intended for a crossing or passage way through there in a legal manner?

A. It is just used largely by pedestrians, there is practically no automobile traffic on that street.

Q. Just a path taken by people as a short cut?

A. Yes sir. It leads into the business district. We are trying to get Comanche opened up so as to get to Main street.

Q. You were speaking of the wholesale houses located on that,—how many of them are located on South Main?

A. Well, there is a good many down there by South Main street, it is getting to be one of the main streets of the city.

Q. One of the leading furniture stores is on that street, is it not?

A. Yes sir, Mr. Chaney is located down there.

Q. I will ask you to what extent these retail stores on south Main are patronized by the people in the third ward?

[fol. 67] A. I think a large per cent of the third ward people patronize Main street stores, from the standpoint of convenience, they are nearer to them. I am sure a great many more will patronize them if we get the streets opened up where they can get across conveniently. It is inconvenient, they have to go back to "A" to

get to Cherokee and they have to go from "A" to Cherokee and come back down on Main street.

Q. So really the only two practical crossing- are on Cherokee and on Ottawa?

A. Yes sir, absolutely.

Q. The territory lying between those comprises most of the third ward?

A. Yes, and Ottawa is a very dangerous crossing, the railway company comes through and cuts it,—it is really dangerous.

Q. It was brought out by cross examination of Mr. Fry that in the block or blocks on Comanche Avenue lying immediately west of the M., K. & T. have not been built up by residences, I believe you stated just now that on Cherokee that was followed by having been *built up*?

A. Yes sir, there is businesses and residences over there. We have lumber yards, a gin, cotton yards and grocery stores immediately west since we have opened up over there.

Q. And a crossing at Comanche Avenue, what, in your judgment, would be the effect of relieving,—that is, what is there for that section of the third ward,—consists of some 1,500 feet there, that it would serve?

A. You mean what number of people that would serve there?

Q. Yes, what would be the effect on its growth and development [fol. 68] by opening up Comanche Avenue on that section of the third ward which is vacant?

A. It is a very beautiful residence property over there which lies high on the hill side and it would be developed very highly; there is a good many residences over there now on account of the beautiful property.

Q. This scarcity of crossings and the inconvenience has rather served to isolate the third ward?

A. Absolutely, yes sir.

Q. And has retarded its growth and development in keeping with other portions of the city?

A. Yes sir.

Q. What, in your judgment, would be the fact of the establishment of a crossing at Comanche?

A. The immediate development of a great many homes on Comanche and even on Seminole; people living on Seminole having to go south or through the fourth ward.

Q. This really keeps them from getting around equally as a social exchange?

A. It does, absolutely.

Q. Anything further, Mr. Farmer, that you think of?

A. Nothing that I know of only we are anxious to do some developing, we want to pave the streets.

Q. By the way, if you were to pave Elm Street so as to make it a suitable street for travel, the paving expense on the east side next to the right-of-way would fall on the railroad?

A. It is not practicable to pave that because the railroad company could protest it out, which they naturally would, I think. I never knew it to fail.

[fol. 69] Mr. Horton: You may cross examine.

The Witness: It is really not a practical street to pave, I wouldn't ask the railroad company to pave a portion of the street, it wouldn't be justified, it wouldn't give any outlet if it was paved.

Mr. Horton: You may cross examine.

Cross-examination.

By Mr. Green:

Chairman Russell: How many grocery stores do you have in ward three?

A. Well, I know of one, two, three, four—I know of four small family groceries.

Chairman Russell: Where do they buy their supplies?

A. In the city here from the local jobbers, I am sure.

Mr. Green: Mr. Farmer, what is the nature of your mercantile business?

A. I am in the dry goods and furnishing and shoes.

Q. In what block on Main Street is this business?

A. I don't know—I am in the block immediately——

Q. Can you tell from this map here?

A. Yes sir (witness consulting map), I am located in block 430.

Q. Abutting on Cherokee east of the tracks?

A. Yes sir.

Q. Where is your home?

A. I am located on the corner of Ottawa and Oak streets, in block 573, I believe.

Q. Do you own any property on Comanche west of the M. K. & T.?

[fol. 70] A. No sir, I do not.

Q. Do you own any other property in the third ward but your home?

A. Yes sir, I own some property there.

Q. Where is it located?

A. I own some on Delaware. I did own quite a bit but I sold it, the reason I (interrupted).

Q. I think that is all.

A. (Witness continuing:) —got rather discouraged. It is just the interest I have in the ward, I have no special property interests involved.

Mr. Green: I think that is all.

Mr. FRANK CRAIG, called as a witness on behalf of the City of McAlester, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Horton:

Q. Your name is F. M. Craig, commonly known as Frank Craig?

A. Yes sir, Frank Craig.

Q. What is your business?

A. President of the City National Bank.

Q. Are you connected with any other business?

A. Yes, I am Treasurer of the Building and Loan Association here.

Q. Where do you reside?

A. McAlester, at the corner of Second and Comanche.

Q. You live on Comanche Avenue then?

A. Yes.

Q. How far from the Railroad?

[fol. 71] A. About a block.

Q. What is the street you live on, Second and Comanche, is this street the street that is most generally used to get up town?

A. Yes, it is the principal street coming up town.

Q. Now then if Comanche Avenue should be opened and become a street, then you would really be right on the corner where Comanche would turn out and come up town?

A. Yes.

Q. How long have you lived in McAlester?

A. Twenty-six years.

Q. You practiced law at first, I believe?

A. Yes.

Q. How long have you been in the banking business in McAlester?

A. Twenty-one years.

Q. Mr. Craig, in your bank, like other banks, you lend money?

A. Yes sir.

Q. And you are connected with the Building and Loan Association?

A. Yes sir.

Q. Mr. Craig have you made a study, or, have you had in mind the existence of conditions in the third ward as to property and social conditions being affected by the present railway crossings along the M. K. & T. south of the Union Depot?

A. Yes sir.

Q. I wish you would please state to the Commission, in your own way, the facts about that?

A. Well, from our standpoint of the experiences in the Building and Loan Association, we have always looked upon third ward property as very undesirable because of its inaccessibility, and, while we make loans in the third ward, we don't make them on anything [fol. 72] like the same basis of value as we do in other portions of the city. We always take the cost of a house into consideration and



because we have always figured that being so hard to reach and so inaccessible that the sale value was so very materially affected, that on a house costing the same money in the second ward, for instance, we will lend about twice as much on a house in the second ward as we will in the third ward. And, I know from personal experience, if this is responsive to your question, I have a friend over there that used to live across the street from me, W. H. Julian, Agent of the Rock Island Railway, who now lives in the third ward. If I want to go to his house, I go to Cherokee north and then come back that two blocks south in order to reach him.

Q. You pass over Delaware then?

A. I don't try Delaware at all, it is right there at the railroad cut, it is a bad street to get across and it is hard to see a train and very dangerous place to cross the railroad track. I don't believe I cross Delaware once a year.

Q. You mean Ottawa?

A. I don't believe I cross Ottawa once a year and I don't believe I have crossed Delaware since the viaduct has been opened at Cherokee.

Q. You go clear up to Cherokee north to get to Mr. Julian's house?

A. Yes.

Q. Why don't you use Delaware?

A. Well, it is narrow and bad. When I go over there it is most [fol. 73] always at night. It is a good place for a hold-up and I don't want to take the chances.

Q. Isn't there a grade switch along there you have to cross?

A. Yes, there is a grade switch.

Q. Mr. Craig returning to this subject of loan values, you have already shown what a disadvantage, comparatively, to property in the third ward as contrasted with property, we will say, in the second ward, what, effect, if any, does that condition have on the development and growth and building up of the third ward?

A. Well, it retards it very much because the people who are living in the third ward are not as a class of people of very much means, the majority of people who have lived in the third ward have had to borrow part of the money—and because of those conditions it has made it harder for them to borrow money from the Building & Loan Association or from the other companies who lend money here to do their building with.

Q. Forced the people to have cheaper homes and living accommodations?

A. It has forced them to build in other parts of the city where they could get loans.

Q. And resulted in a sparser population of the third ward and less highly improved conditions?

A. It has.

Q. Speaking of Elm Street, Mr. Craig, as a mode of highway for travel, what do you think about that?

A. Just Elm Street.

Q. That is that little street that runs along there north and south? [fol. 74] A. West of the Railway.

Q. Yes, skirts up to the right-of-way there?

A. Well, it would be impracticable under any present or prospective conditions to make a street there because of the character of the ground. It would be very expensive to build a street on there, the property is undeveloped along it on the west side of the street so that if the city were to attempt to pave it it would be impossible to sell the improvement bonds to anyone because property values there wouldn't support them.

Q. So that these conditions there are due to the lack of crossing facilities which have really put that part of the third ward back—

A. Yes sir, it has.

Cross-examination.

By Mr. Green:

Q. Mr. Craig, where is your home?

A. My home is on the north half of Lot 10, in block 479.

Q. In other words the corner south of the street is Comanche Avenue and east of the M. K & T. tracks?

A. Yes.

Q. Do you own any property in the third ward?

A. Yes.

Q. How much and where is it located?

A. I can't tell you just where it is located. I have two lots.

Q. Just give the blocks?

A. I couldn't give that.

Q. Are they on Comanche Avenue?

A. No, they are not on Comanche Avenue.

[fol. 75] Q. Do you know what street they are on?

A. I can't be sure but I believe they are on Seminole.

Cross-examination.

By Mr. Hopkins:

Q. They are south of Comanche Avenue?

A. I am not sure. I believe it is block 5 and part of lot four in block 485, now that is my belief I couldn't be positive.

Q. Then your personal interest in this matter is largely about your loan business and your banking business would be helped by the development of the third ward?

A. No, I don't know that it would help out business at all because we have more applications for loans than we can take care of, consequently we are not giving them to the third ward but if that street was opened we would give the third ward much more consideration.

Mr. Hopkins: That is all.

Redirect examination.

By Mr. Horton:

Q. Nearly all the structures outside of the school building and possibly Captain McKimmins' old home, which I believe is of rock built,—nearly everything is frame?

A. I think everything down in that part immediately south of the Rock Island Railway track is, there are some brick houses.

Q. I will ask you what accessibility the Fire Department has in case of fires in that ward there to speak of on a loan basis?

[fol. 76] A. Well, now I am not an expert on fire matters. It seems to me it would seriously affect it.

Chairman Russell: The Commission thinks he has already hit the third ward hard enough.

Mr. Horton: That is all.

Mr. Hopkins: Mr. Craig, you have said, I believe, that it was necessary at Delaware to cross a switch at the grade?

A. Yes.

Q. Do you know whether it would be possible without prohibitive expense to construct an under-pass at Comanche without at the same time having the necessity of crossing an industry track at that grade?

A. I presume you would still have to cross that track at Comanche, but the difference would be that would be——

Q. There is very little movement over that track, isn't there?

A. Very little, it is my understanding.

Mr. Hopkins: That is all.

Mr. Green: Do you know where the fire plugs are located in the third ward?

A. No.

Q. Are there any on Comanche Avenue?

A. I don't know.

Chairman Russell: We will recess until 1:30 and get back sooner if possible.

(Whereupon hearing was recessed until 1:30 p. m.)

[fols. 77-101] (Hearing resumed at 1:30 p. m., before Chairman Russell.)

Chairman Russell: If you are all ready we will proceed with the hearing.

[fol. 102] Miss ROSE D. EWENS, called as a witness on behalf of the Respondent, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Green:

Q. You were sworn this morning in this case, weren't you?

A. Yes.

Q. You are the City Clerk?

A. Yes sir.

Q. I hand you here a record book and ask you what that is?

A. Ordinance Record No. One.

Q. Of McAlester?

A. Yes.

Q. I will ask you if that contains Ordinance No. 74?

A. It does.

Q. What date does that show that Ordinance to have been passed and approved?

A. It was approved on the 8th day of November, 1901.

[fol. 103] Mr. Green: We offer in evidence the Ordinance and ask leave to substitute a certified copy for the record.

Mr. Horton: We desire to ask the purpose for which it is sought.

Mr. Green: As proving a contract between the M., K. & T. and the Plaintiff in this case, covering among other things the Comanche Avenue crossing if it should be ever opened.

Mr. Horton: The City of McAlester objects on the ground it is incompetent, immaterial and irrelevant and for the further grounds that it is attempted to introduce it as a contract. It is beyond the power of the City Council to *have* bind the city in any such way. All those things are subject to a general law and that if it had been valid at that time, which we deny, it has been superseded by subsequent legislation which gives to the Corporation Commission power to apportion the expense between the parties and to assess such part as the city ought to pay, if, in the judgment of the Commission it should pay anything; and, for the further reason, one of the conditions of the Ordinance, which is sought to be introduced here as a contract, that the railroad should provide an under-grade crossing at Delaware and the evidence shows here it has utterly failed to do it, and it would have been part of the consideration of the alleged contract and necessary to support it and they haven't kept that part themselves and for all those reasons, the city objects to the introduction of [fol. 104] this Ordinance No. 74; for, as I understand it is introduced for the purpose of showing the contract between the city of South McAlester, I. T., and the M., K. & T. Railway Company, whereby it was stipulated in Section 9 that if Comanche Avenue should ever be opened all the expense of it should be borne by the City of McAlester. I think that contract is ultraviolate and contrary to public policy.

Chairman Russell: The Commission recognizes that it is very doubtful as to the validity of this document but it would take less time to put it in the record than to,—It will be considered on the

basis for such value as it may have. If we were drawing strict technicalities we would,—The Commission will endeavor to keep itself free from bias and prejudice and consider each of these things when we come to them. The objection will be overruled.

Mr. Horton: I understand that is your general custom in all these hearings and that there is no exception being made in this case; at the same time I want to vigorously protest against it. I don't think the City Council could have provided such a thing, and, if so it was superseded by the act of 1919 which provides the cost should be apportioned by the Corporation Commission and makes the Corporation Commission the exclusive arbitrator and Judge and provides that an amount greater than one half shall not be assessed against the City.

Chairman Russell: All these facts will be considered.

Mr. Green: Your objection don't go to having a certified copy of it [fol. 105] introduced, does it?

Mr. Horton: Not at all.

Mr. Green: Then we ask the certified copy *by* identified as Exhibit One. Inasmuch as Judge Horton raises some very grave legal questions, I am going to ask now, I be permitted to file a brief on this.

Chairman Russell: You will be given permission to do that.

(Mr. Green reads part of the Contract above referred to, which is not reported at the request of council.)

Mr. Horton: I want to add to our objection this Ordinance offered as a purported contract is inadmissible for the further reason that it is without consideration,—without inadequate consideration.

Mr. Green: Miss Ewens, I hand you here another book and ask you to state what that is?

A. Aile proceedings No. 2 of the City of McAlester.

Q. Will you please turn to the records of April 5, 1909, and see if you find recorded there Resolution No. One of that day?

A. (No response.)

Mr. Green: The Defendant will now offer three or four Resolutions passed in April, 1909, by the City authorities of McAlester, for the purpose of showing that they, at that time adhered to and continued to carry out the terms and provisions of Ordinance 74.

(Witness explains some records which are not reported at request of Counsel.)

Mr. Green: I just want to say for the record that these resolutions [fol. 106] cover the action of the City of McAlester in April, 1909, offsetting a judgment they had promulgated against the M., K. & T. for taxes against certain parts of the cost of certain crossings built over the M., K. & T. premises under and in accordance with Ordinance No. 74. You find Resolution No. 2, do you?

A. It don't seem to be numbered.

Q. You find a Resolution referring to a judgment against the M., K. & T. on April 5, 1909?

A. (No response.)

Chairman Russell: This may be interesting as ancient history and we will overrule the objection and note an exception.

Mr. Green: Do you also find as of April 12, 1909, Resolution No. Two? You find that?

A. Yes.

Q. Do you have also resolutions Nos. 3 and 4 as of April 13th?

A. Yes.

Mr. Green: The Defendant now offers all of these Resolutions in evidence according to the statement I have just made and for the purposes I have stated. In other words, we now contend they have no right to make the contract. I want to show ever since statehood they continued to ratify and live up to it, and, if through some technicality it might be illegal as a strict legal proposition,—it was not properly passed or was overreaching, it would certainly come from bad grace after reaping the benefits of it and trying to get out of it now.

[fol. 107] Mr. Horton: To the offer of each part of the Resolutions the City of McAlester objects for the reason are all the reasons given in the objection to the admission of Ordinance No. 74, and asks that these reasons be considered as applicable to each one of the offers; and, for the further and additinal reason that the original contract being void in so far as it affects Comanche Avenue and that it could not be ratified and made binding; and, for the further reason that the offers now made in nowise pertain to Comanche Avenue. You understand Ordinance No. 74 was introduced for the purpose of showing the entire cost of opening Comanche Avenue should be assessed against the city for the reasons already stated. We say, that is the thing that could not be done. The offers now made are wholly immaterial, irrelevant and incompetent.

Chairman Russell: The objection will be overruled and exceptions noted and the Resolutions will be admitted for such consideration as the facts warrant when they come on for consideration.

Mr. Green: We ask permission to substitute certified copies to the record.

Mr. Horton: There will be no objection to that.

Mr. Green: Also a certified order of the judgment to which they refer. This is all for this lady if you are through with her.

(No response.)

Witness excused.

[fol. 108] Z. G. HOPKINS, called as a witness on behalf of the M., K. & T. Railway Company, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Green:

Q. Please state your name and residence and official position with the defendant railway?

A. Z. G. Hopkins, residence, St. Louis, Missouri; I am Assistant Chief Operating Officer of the Missouri, Kansas and Texas Railway.

Q. Mr. Hopkins, I wish you would just go ahead and state in your own way the attitude of the defendant toward the opening of Comanche Avenue, if it is done in accordance with contract ordinance No. 74?

Mr. Horton: We object to that question. It is hypothetical and put in accordance with something else.

Mr. Green: We just want to show what the attitude would be if it was adhered to.

Chairman Russell: What was that question now?

Mr. Green: Mr. Hopkins, I wish you would just go ahead and state in your own way the attitude of the defendant toward the opening of Comanche Avenue, if it is done in accordance with contract ordinance No. 74? In other words, whether we are still willing to carry out our part of the contract and let it be opened without any objection on our part so long as the city lives up to the contract?

Chairman Russell: That is all right for him to tell what their attitude is.

[fol. 109] Mr. Green: He speaks officially.

Mr. Horton: We object to the testimony called for by the question.

Chairman Russell: The objection will be overruled and exceptions noted.

A. So far as the opening of an under-grade crossing at Comanche Avenue is concerned, we would object to it if it is opened in conformity with Ordinance 74, which we consider is a contract made by the Railroad and the City carried out in good faith on our part. I would like to state, however, that the opening of an under-grade crossing at Comanche Avenue without the lowering of our tracks as we go south, an induction of the grades would necessitate raising the track at Comanche Avenue, and the points between there and Delaware, which, until such time as our grade was reduced would be some disadvantage to us for the reason that we have a very difficult grade situation right at this point any how. The grade south bound as we approach the Rock Island crossing is against the movement of trains. After you pass the crossing you start then on another grade as you approach a point down about Osage Avenue—Osage is approximately at the top of the hill, that, if the Commission please, is the next street beyond Ottawa?

Mr. Horton: You mean South Ottawa?

A. Yes sir; however, while it would be some slight disadvantage to us, until such time as that grade is reduced, we would not object to the construction of an under-grade crossing at Comanche Avenue on that account, if it were put in under the terms of the contract [fol. 110] covered in Ordinance 74.

Chairman Russell: The raising of that would in the end be an advantage.

A. The raising of the track, unless the gradation south were re-

duced would not be an advantage. It would be no disadvantage if the grade is reduced at the point farthest south. I might state in that connection our own plans, independent of the Comanche Avenue crossing question, contemplates a reduction of that grade some time, we hope in the near future, depending a lot on our financial situation.

Q. Just state anything else you desire to state.

A. From an engineering standpoint, I might say, we have had our Engineer make some preliminary investigations as to the feasibility of an under-grade crossing at Comanche Avenue, except for the things to which I have already referred, it is feasible from an engineering standpoint in the opinion of our Chief Engineer, who at my suggestion has made a preliminary investigation. A reinforced concrete girder of probably 24-feet clear span would be the structure required to carry our tracks over the roadway. It would be necessary also in order to get the over-head clearance necessary in the subway to lower certain industry tracks east of our main line tracks leading up to various wholesale concerns north of Delaware Avenue fronting on Main Street.

A voice: How many tracks please?

A. At Comanche Avenue I think there is two,—no there is one at Comanche Avenue. Our preliminary investigation indicates that [fol. 111] it would probably be necessary to lower the grade of the industrial side tracks between two and three feet in order to get the required over-head clearance, and, of course, it would also be necessary to raise the main line tracks to some extent. The main track would have to be raised slightly more than a foot at Comanche Avenue. The estimates of the expense of such a structure as I have outlined and the necessary changes in the main line and the industrial side track levels indicate the cost of the structure complete, ready for use, would be in excess of \$28,000.00.

Q. Is there any matter of additional tracks to be provided for on the road bed proper?

A. It would be necessary, of course, in providing a structure in such a way as to accommodate additional tracks if the necessity for them developed. We have plans for a double track development if the traffic increases which perhaps would require one or more additional tracks on that fill.

Q. What would be the attitude of the railroad towards the crossing of Ottawa if it should be found feasible and proper in the event Comanche Avenue is opened as an underhead crossing?

Mr. Horton: I don't think that issue is called for in this.

Chairman Russell: Let him give his views?

A. I think that would obviate any objection from a railway operating standpoint. The opening of an under-grade crossing would be of absolutely no benefit to us unless it carried with it the elimination of some grade crossings and the reduction of hazards at grade crossings.



[fol. 112] Chairman Russell: It would be of some advantage to the extent of what portion of the people who voluntarily travel it.

A. I speak from an operating standpoint and with this thought in mind some of the benefits in the number of trains from the elimination of grade crossings are considered, but, so long as you have a grade crossing, you never can tell when you are going to find someone on it, and, of course, so long as there is a grade crossing there, although *there* may not be frequently used, it requires some attention to control speed and all those things.

Q. Do you care to introduce in evidence this blue print in connection with your testimony?

A. I think that is desirable. It will enable the Commission to determine the track situation.

Q. This does show the M., K. & T. track situation, does it?

A. Yes sir.

Q. I will first ask the Reporter to mark the Resolutions offered as being identified as Defendant's Exhibits 2, 3, 4, and 5, and a certified copy of the judgment referred to as Defendant's Exhibit 6, and then this map as Defendant's Exhibit 7.

A. I would like to add, if the Commission please, in connection with the grade reduction plans to which I have referred which will involve de-penning the cut at and near Osage Avenue, we feel when this work is carried out that it would be advisable to put in an over-head crossing at Osage, and that, we have had in mind suggesting to the city at that time, that the crossing at Ottawa Avenue, that [fol. 113] grade should be closed.

Chairman Russell: How far is Osage south of Ottawa?

A. One block; that, with this grade reduction will lend itself naturally to an over-head structure because the lines will pass through a cut there and it will not be necessary to make heavy fills to get an approach to an over-head structure, or, will it be necessary to make any excavation to get sufficient over-head clearance.

Q. What was that over-head clearance that you named?

A. I might say, for the information of the Commission, that the type of structure that our engineering department has considered as advisable at Comanche Avenue is the same type of structure as was put in at Alice Avenue in Oklahoma City. The Commission made an order in connection with that grade and the plan was approved by the Commission, that was a situation very similar to this. I said that in order if you want to consider the plan in any way. We have prepared no definite plan for this structure. You can get a line on what we consider would be necessary to carry the tracks there. There has been more or less said about the crossing at Delaware. There are two 24-foot spans over Delaware Avenue. Now, it is possible that at small expense, relatively small expense as compared to a grade separation at Comanche Avenue, as far as the railroad is concerned, to get a very satisfactory crossing at Delaware, it is not paved at this time but it could be paved; railings could be provided that would obviate any of the differences which have been brought

out. The size of the span is shown on the map we have filed as an exhibit.

[fol. 114] Mr. Green: That is all for us.

Cross-examination.

By Mr. Horton:

Q. Now when you speak of a 24-foot span, does that include the inside measurement?

A. Yes sir.

Q. You mean there is a clear space of 24 feet between the base of that column there in the center that comes down there between those two spans?

A. They are separate units.

Q. What is the width from outside to outside of the whole span?

A. Well, I have 24 feet inside.

Q. Clear between the base—

A. It would depend on how much excavating you do out at the side. If it is desired we can furnish the exact dimensions of that.

Q. From Delaware crossing up to south Main, don't you remember there is just a narrow strip along there, it is mostly occupied by the branch, the canal runs right through the center of the street and there is a good part on the north side of the branch and then the remnant left on the south side. I don't believe the Commissioner can hear very well unless the Gentleman talks a little louder,—on the south side there that would make a very narrow street, that would constitute the street for use, wouldn't it?

A. As the matter now stands so far as your ingress and egress of [fol. 115] railroad property is concerned we could give you additional space to the south there.

Q. The property line, I think comes right in here (Indicating). I am speaking of the north boundary line, Lot One, Block 480, between that north boundary line and the edge of that storm sewer there. Do you know how wide that is. This is the point I am indicating at, at the northeast corner of Lot One, Block 480?

A. This map is drawn to a scale, the Commission can reach a conclusion on that.

Q. As a matter of fact it is narrower there at that point than it is down on the railroad right-of-way,—much narrower?

A. The map indicates it is, yes sir.

Q. The map indicates it is not over half as wide?

A. It would hardly indicate that.

Chairman Russell: The greatest objection to Delaware Avenue is that that and Cherokee are close together and that there is not much use for it there.

A. The only point in my mind in connection with that is this: There has been more or less reference to the fact that there is no crossing between Delaware and Ottawa and that that is a distance

of 1,500 feet, approximately, I think, as Mr. Fry testified, it is our position and intention that a distance of 1,500 feet between crossings where grade separations have been made in cities, it is not an excessive distance. The practice generally adhered to in communities much larger than this is putting grade separations at intervals of from three to four blocks.

[fol. 116] Chairman Russell: But, having in mind the overhead, which, in time would be desirable down at Osage that would further lengthen the distance, that being the case, it would be much more convenient to divide the distance from Cherokee to Osage with the under-grade at Comanche than it would be to have Delaware and Cherokee right together.

A. There is no question as to that, of course, our position simply is the distance which would be computed from Delaware, because there is a situation there that can be taken care of and develop a very satisfactory crossing.

Chairman Russell: No question but what that could be done, but the Commission does not feel the city would be justified at this time with the amount of traffic that is available to go to the extra expense of fixing up Delaware, when we assume both drives can practically be accommodated on Comanche Avenue. These under-grade crossings are really too expensive where you have to bridge an open sewer?

A. Neither the community nor the railroad can stand it.

Mr. Horton: Even if you bridge that open sewer, when you got down to that archway there at its narrowest point down there, it would still be too narrow.

Chairman Russell: Well you are going to come one way on one side and the other on the other.

A. If it fronts on that siding you could go on either side.

[fol. 117] Chairman Russell: Right at this point I might give the Commission's views with reference to matters of this kind. When the question comes up of discussing the apportionment of costs between the railroad and the city or between the carriers and the public, the Commission does not view it in that way, we look beyond the carrier. The carrier is only a means and a facility through which the costs in the end is collected from the public. The transportation Company has no funds, it has its original capital but for operating capital it has no funds but what it collects from the public; and the question comes before the Commission for consideration is: what portion of this cost should be borne by the people locally and what portion should be borne by the general public over the entire system and that portion should be, we say, we assess against the carrier, knowing as we do the carrier must in the end collect it from the patrons, the local people also paying a portion of that which is applied to the carrier, also the people over the entire line paying that portion of it to be assessed to the carrier as the advantages which accrue to them by reason of the better operating facilities and also

by the less damages,—when we have a crossing there and some fellow attempts to beat the Katy Flier to the crossing and he doesn't succeed, the particular community where he lives has its widow and orphans on its hands and such damages as may be assessed to the carrier has to be borne by the carrier, not by the carrier direct, but by the public as a whole *on* the patrons of that railroad have to pay it, either through passenger fares or freight charges to furnish the money to pay the damages that are assessed; so, in that connection, [fol. 118] when a safe crossing has been provided. The Commission can not agree with one or two of the witnesses here who have said that people of good judgment will go to the under-ground crossing where it is safe, but we believe the dangerous crossing should be left open so that those who desire to do so can use it,—is it not made from the view point that the fellow is just taking his own chances and if he gets killed the railroad company pays for it, and, so it is a matter which should be seriously considered. And when the public has taken steps through the regular channels of government and supervision to provide a safe crossing, then it is the right of the public to say to the reckless fellow, "if you don't want to use the safe crossing, that you must use the safe crossing, that we can not afford to take chances on you getting yourself killed and leaving your widow and orphans on the community and also having a big damage bill which ostensibly is assessed against the carrier, which, we as patrons must pay in the end, that comes very forcibly before the Commission for the reason it is our business all of the time to watch at every point to get lower rates for the public, and all the damages that are paid and all the court costs and all those things that pile up in the operating costs and stare us in the face when we go to consider what rate the public must pay to maintain the business; and, if the facts as developed so far in this hearing, that the country people who live southwest can reach the city on just as short a road and just as convenient by driving a little further north than going through an under-pass instead of going through the dangerous crossing when there is no very great advantage to [fol. 119] to be had then that should be eliminated, and, it appears to the Commission from the facts so far developed that there should be an under-grade crossing at Comanche and if that is completed so that the public can use it,—then we should apportion out ourselves the distance apart so that the travel can be accommodated and let the man with good judgment go to them voluntarily and let the fellow with bad judgment be forced to go to them for the protection of his neighbors.

Mr. Horton: If your Honor please, I am very much struck with what the views of the Commission are as a whole and it is a general application, which, in this particular instance the city complains there are insufficient number of crossings to give the third ward sufficient accommodation. It would not be our idea that the grade crossing at Ottawa should be abolished, as a matter of fact, I think there have been no accidents at that crossing since it was opened.

Chairman Russell: If there hasn't been it would be a very happy thing to dispose of it before they do have one.

Mr. Hopkins: They have had.

Mr. Horton: Of course, if they should put an over-head crossing at Osage we would have no objection, but we don't think that our application to have the under-ground crossing at Comanche should be conditioned upon the abolition of the grade crossing at Ottawa.

Chairman Russell: That is not a part of the case that is before us now, but I took occasion there to express what the Commission's [fol. 120] views were and the end to which we were striving toward.

Mr. Horton: Yes, yes, the number of crossings if Comanche is opened will still practically only be two south of the junction, that is if you cut out Ottawa, you would still only have two.

Chairman Russell: The Commission must recognize no good paved crossing there would handle all the traffic that comes before there, and, a little later on there must come before the Commission the question of apportioning the costs of this work and as I laid down the rules in which we must in fairness be governed by and if this expense were to be incurred and you had no grade crossing by eliminating the operation conditions, therefore, the benefit which accrues to the patrons of the road as a whole, the only saving the carrier gets is that portion of the public which voluntarily uses the under-ground crossing is protected and reduces the possibility of a damage claim.

Mr. Horton: We think this is a matter to be dealt with as it might arise. We would be in a very serious condition if we would have Ottawa closed unless Osage was opened. We wouldn't like that. We realize the element of risk and danger which remains while Ottawa grade crossing is obtained is something to be considered and if that is removed by closing that it should be included, of course, taking into consideration the apportionment of the expense on Comanche, because if they were getting any resultant benefit from the closing of the other and apportioning the matter of expense, but we—(interrupted).

Chairman Russell: Also, these are matters which should be looked [fol. 121] into in general, for this reason, if we wait until a city settles up and people have property butting right up against the right-of-way, as at Tulsa, where they are thick all along the line and they will insist they have some under-ground crossings—which makes an impossible situation and then we are up against this: The people who have that property abutting on the street, and the question of closing it, then they are up for damages and, so it is well to face these things on ahead and work toward a definite end and, after a conference over the matter and it was planned out the proper thing to do was to open up Comanche and after that was done and provided for open Osage and then close Kiowa, then somebody wouldn't be building up some property—(interrupted).

Mr. Horton: You mean Ottawa instead of Kiowa?

Chairman Russell: Yes. The man who has the little house and later on if he should build a two or three story brick, then the question comes up—that is why it is well to work these things out ahead and for that reason I was going beyond the scope of this case to outline

to you what the Commission's policy is in matters of this kind and the results we hope to obtain as rapidly as practicable. Is there anything further?

Mr. Hopkins: We have had the principle you have just announced in our development plans for our grade reductions, and, we felt in view of our agreement with the city, the burden of opening Comanche was on the city, but, in view of the fact there is now an existing grade crossing at Ottawa which is not satisfactory, either to us or the [fol. 122] city, with the development of our plans there that should be eliminated by the provision of an over-head, but, as I said, if an under-grade crossing is provided at Comanche without closing the grade crossing at Ottawa from an operating standpoint, there is little or no compensating benefit to the railroad.

Chairman Russell: The Commission realizes all the things now being discussed are not going to be accomplished this summer. If that is the proper solution in the end, it should be planned along that line. If the public is—then they will in so locating and so developing the abutting property as to put themselves in a position to be entitled to compensatory damages later.

Mr. Horton: I want to say, if the Commission please, right at this point, we hope that the Commission if it makes an order for the opening of Comanche Avenue, it will not take into consideration at all the question of closing Ottawa. We are dissatisfied with the grade conditions and the closing of Osage so far,—The Rock Island has at every street a grade crossing open and the Katy has one up there at Monroe, one at Cherokee and over here at Ottawa and those are all they have outside of the one at Grand Avenue, because Delaware is not a crossing, they put it down there to take care of that branch, it is not practically used, just casually like we use a railroad and here for a distance of three or four miles the Rock Island has these crossings all along. Your Honor, I protest seriously on behalf of the City against this idea of closing Ottawa to be taken into consideration in connection with this hearing. If Ottawa should [fol. 123] be closed, I don't think it should be,—The Commission in considering this matter, the contemplation of closing this up at Ottawa, we think we ought to have another crossing for the people to get back and forth. There is a great part of the second ward,—a tremendous population over there. The people in that part of the second ward and the people in the third ward ought to be permitted to pass back and forth to see each other through Ottawa, and, even with that they would have only a very limited number of crossings which the Rock Island gives us and I don't believe there has been many damages against them for all their crossings, none of any serious consequences. Inasmuch as we have been favored with the views of the Commission I thought it well,—if that should be deemed advisable, then, of course, that will be a matter for consideration at that time, but we think we ought to have enough crossings in the large line of territory that is covered by the Katy from the time it enters the city on the north and leaves on the

south and we ought to have as many as they would still have by still keeping Ottawa open.

Chairman Russell: The Commission will refrain from further comment.

Further examination of Mr. Hopkins.

By Mr. Horton:

Q. Mr. Hopkins, you say some tentative estimate by your engineering department indicated the cost of this crossing down there of something in excess of \$28,000.00?

A. Yes sir.

[fol. 124] Q. That was exclusive, I take it of the other changes that would be necessary, the raising of the grade and the lowering of the service track along there?

A. Yes sir, all things necessary to be done to provide the crossing.

Q. What portion of that sum covers the cost of raising the grade?

A. I am unable,—The preliminary estimate was made by our Engineering office in St. Louis and Mr. Thomson our District Engineer is more familiar with that estimate and he can give you that information. Knowing the cost of similar bridges at other points, approximately \$18,000.00 would cover the cost of the structure to carry the track. The other portion would be the raising of the grade and the lowering of the industry tracks and the paving. I know approximately the cost of the Alice Avenue crossing in Oklahoma City, that wouldn't give us much to go by in this case. The construction of the cut-off, it wasn't necessary to excavate to get under,—I know the cost of the concrete structure and the cost of the — (?) crossing and others and I believe the approximate cost of \$18,000.00 would cover the cost of the concrete and the excavation and the structure. The amounts in addition to that would be the expense of raising the main line tracks and the paving.

Q. You know at Cherokee the top of the dump there is a good deal wider than it is down at Comanche, isn't it Mr. Hopkins?

A. I think it is, yes.

[fol. 125] Q. Now all they had to do was some track raising and when they put in the under grade crossing at Cherokee that only cost about \$7,000.00?

A. I can say on that score that was done a good while ago.

A. But a great deal more work?

A. When we attempt to duplicate our jobs for what they used to cost they are more than doubled—

Q. I wouldn't think they would run four times as much?

A. We have had some that run more than three times as much.

Q. Your estimate included a diagonal crossing as indicated there?

A. We have made no detailed plan for that crossing. We have come to the conclusion that a 24-foot girder type would be required and that would afford adequate passage way as to the alignment of the roadway. We have made no detailed plans for our improvements, though, after looking over the ground I think that a right



angle crossing would not be the desirable crossing there, it would probably be necessary to get some additional property there in order to get the proper alignment.

Q. Mr. Hopkins, the road is figuring on making that elevation of its trackage there any way, isn't it?

A. Oh, yes, we are there and many other places but we have made extensive plans for grade revisions all over the railway but they are all conditioned to the development of the traffic to a point where the saving would result in returning the additional investment required.

Q. Would you say you must raise the tracks there in order to have an under-ground crossing there instead of an over-head?

A. (No Response.)

[fol. 126] Chairman Russell: Anything further?

Mr. Horton: I will ask you, Mr. Hopkins, whether or not you know it to be a fact, an engineering fact, that the track at Comanche will have to be raised in order to have an under-ground crossing?

A. The result of the investigation of our Chief Engineer he says that that will be necessary; from my observation of the ground, it seems to me that it would be necessary.

Chairman Russell: It being within the plans of the company to raise that any way, they would do it.

Mr. Horton: We are absolutely convinced we have plenty of room there to go under it, even if we had to scoop a little there to go under it, we could supply storm sewers to take care of the water. It is not an essential thing to raise the track, we do not think it is a fact it is absolutely necessary to raise the grade in order to provide us with this under grade crossing.

Mr. Hopkins: I will say as to that, if the Commission please, it is speculation as to whether it is or is not necessary to raise the tracks. There is an established over-head clearance for over-head crossings and I think the Commission is informed as to what the clearance is. The question as to whether the raising of the tracks is a matter of speculation.

Chairman Russell: The Commission has no views on that at all. We will rely on our Engineer on that point, as to what is and was necessary, he has all the facts and will go into it very carefully.

Mr. Horton: What is the number of feet necessary there? Generally what is the requirement of the Federal Highway Department? [fol. 127] Mr. Thomson: Fifteen feet in cities and in some places they will consent by special permission from Washington to 12½ feet.

Mr. Hopkins: Anything under 14 feet is highly undesirable. Sometimes there are some pretty high roads.

Chairman Russell: They are figuring on some farmer might bring some hay in there?

Mr. Hopkins: We hope he will and ship it.

Mr. Horton: We have plenty of room down there.

Chairman Russell: I am sure you wouldn't want an opening there that would prevent moving vans carrying people into the third ward.



Mr. Horton: We had thought seriously that there was sufficient room there for sufficient over-head for the crossing.

Chairman Russell: It appears to me there is from the climb I made there this morning. Those are facts the Engineers figures will show.

Mr. Hopkins: As Senator Russell said, that is a matter for the Engineers, we could speculate on it but we wouldn't get any where. If the Commission desires we will be very glad to furnish the height of the dump there from our records. I wouldn't want to submit it off-hand. We have nothing further I think, Senator. On any plan for a bridge to carry our tracks we would, of course, have to insist the structure carry the tracks would conform to the established standards.

[fol. 128] Chairman Russell: The Commission wouldn't consent to anything else.

Mr. Hopkins: I was just suggesting that in connection with any plans the city may present, they should prepare them with that in view to carry the track road.

Chairman Russell: How long will you want to file your brief?

Mr. Green: Thirty days.

(Further argument by counsel which is not reported.)

Chairman Russell: The case will be closed. We will give you fifteen days to file your brief and you may answer whatever you want to.

(Case closed.)

[fol. 129]

DEF'TS' Ex.

#### M., K. & T. Resolution No. 1

Resolved, That the City Clerk be directed to draw warrant in favor of the Missouri, Kansas & Texas Railway Company for Ten and 85/100 (\$10.85) Dollars, to cover court costs payable by the City in the case of Missouri, Kansas & Texas Railway Company vs. City of McAlester and Ira N. Eubanks as Tax Assessor and Collector of the City of McAlester, said case bearing Court Number 2769 on the docket of the United States Court for the Indian Territory at McAlester, the judgment for said costs having been rendered in favor of said Railway Company and against the defendants on December 18, 1906.

PITTSBURG COUNTY,

State of Oklahoma:

I, J. M. Gannaway, City Clerk of the City of McAlester, hereby certify that the above and foregoing is a full, true and correct copy of the original Resolution No. 1 adopted by the Mayor and City Council of the City of McAlester, on the 5th day of April, 1909, and the same appears on record on page 618 of the Record of Council

Proceedings No. 2 of the City of McAlester, in the office of the City Clerk.

Dated at McAlester, Oklahoma, this 23rd day of April, 1909.

(Signed) J. M. Gannaway, City Clerk. (Seal.)

[fol. 130]

DEF'TS' Ex. 2

M., K. & T. Resolution No. 2

Resolved, That the bill of the Missouri, Kansas & Texas Railway Company against the City of McAlester for street crossings constructed in accordance with Ordinance No. 74, entitled: "An ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the city of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys, in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes;" for Sixty-five and 65/100 (\$65.65) Dollars for the undergrade crossing at Delaware Avenue, and for Five Thousand Five Hundred and Eighteen and 4/100 (\$5,518.04) Dollars for the Grand Avenue bridge, and Three Thousand Seven Hundred and Fifty and no/100 (\$3,750.00) for the undergrade crossing at Cherokee Avenue, be accepted as the true and correct amount in each instance due from the City of McAlester to the Missouri, Kansas & Texas Railway Company on account of said crossings as so constructed under said Ordinance No. 74.

PITTSBURG COUNTY,

State of Oklahoma:

I, J. M. Gannaway, City Clerk of the City of McAlester, hereby certify that the above and foregoing is a full, true and correct copy of the original Resolution No. 2 adopted by the Mayor and City Council of the City of McAlester, on the 12th day of April, 1909, and the same appears on record on page- 628 and 629 of the Record of Council Proceedings No. 2 of the City of McAlester, in the office of the City Clerk.

Dated at McAlester, Oklahoma, this 23rd day of April, 1909.

(Signed) J. M. Gannaway, City Clerk. (Seal.)

[fol. 131]

DEF'TS' Ex. 3

M., K. & T. Resolution No. 3

Resolved, That the City Clerk be directed to issue a warrant in favor of the Missouri, Kansas & Texas Railway Company, equal to the amount of taxes levied against the property of the said Railway Company by the City of McAlester for taxes due for the year 1906.

to-wit: the sum of Eighteen Hundred and Fifteen (\$1,815.00) Dollars, the amount of said warrant to apply as a credit on the one-half of the cost of the Delaware Avenue crossing and the Grand Avenue crossing, in accordance with the terms of Ordinance Number Seventy-four, entitled: "An ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys, in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed, and for other purposes." The amount so due from this City on the Delaware crossing being sixty-five and 65/100 Dollars (\$65.65), and the amount so due from this city on the Grand Avenue crossing being Five Thousand Five Hundred Eighteen and 4/100 (\$5,518.04) Dollars; and that said warrant be received by B. P. Hammond, Acting City Attorney, in full payment of all taxes due by the Missouri, Kansas & Texas Railway Company to the City of McAlester for the year 1906.

PITTSBURG COUNTY,  
State of Oklahoma:

I, J. M. Gannaway, City Clerk of the City of McAlester, hereby certify that the above and foregoing is a full, true and correct copy of the original Resolution No. 3 adopted by the Mayor and City Council of the City of McAlester, on the 13th day of April, 1909, and the same appears on record on pages 630 of the Record of Council Proceedings No. 2, of the City of McAlester, in the office of the City Clerk.

Dated at McAlester, Oklahoma, this 23rd day of April, 1909.

(Signed) J. M. Gannaway, City Clerk. (Seal.)

[fol. 132]

DEF'TS' Ex. 4

Resolved, That the City Clerk be directed to issue a warrant in favor of the Missouri, Kansas & Texas Railway Company equal to the amount of taxes levied against the property of the said Railway Company by the City of McAlester for taxes due for the year 1907, in the sum of Eighteen Hundred and fifteen (\$1,815.00) Dollars, the amount of said warrant to apply as a credit on the amount due from the City of McAlester to the said Missouri, Kansas & Texas Railway Company because of the construction of the Cherokee Avenue crossing in accordance with the terms of Ordinance No. 74, entitled: "An ordinance to provide for street crossings across the right-of-way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys, in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated

and closed; and for other purposes." The amount so due from the City to the said Railway Company on account of the Cherokee Avenue crossing being Three Thousand Seven Hundred and Fifty and No/100 (\$3,750.00) Dollars; and that said warrant be received by B. P. Hammond, Acting City Attorney, in full of all taxes due from said Missouri, Kansas and Texas Railway Company to said City of McAlester for the year 1907.

PITTSBURG COUNTY,  
State of Oklahoma:

I, J. M. Gannaway, City Clerk of the City of McAlester, hereby certify that the above and foregoing is a full, true and correct copy of the original Resolution No. 4 adopted by the Mayor and City Council of the City of McAlester, on the 13th day of April, 1909, and the same appears on record on pages 630 and 631 of the Record of Council Proceedings No. 2 of the City of McAlester, in the office of the City Clerk.

Dated at McAlester, Oklahoma, this 23rd day of April, 1909.

(Signed) J. M. Gannaway, City Clerk. (Seal.)

[ fol. 133 ]

DEF'TS' Ex. 5

Ordinance No. 74

An Ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys in lieu of other crossings now in use, and which, upon completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes:

Be it ordained by the Council of the City of South McAlester:

Section 1. That Monroe Avenue, Grand Avenue, Delaware Avenue, and Miami Avenue, shall be and hereby are opened across and over the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the city of South McAlester by grade crossings at Monroe and Miami Avenues, and by an over-grade crossing at Grand Avenue, and by an undergrade crossing of the main and passing tracks at Delaware Avenue, and by a grade crossing of the side tracks now constructed, and those hereafter to be constructed at Delaware Avenue, all as hereinafter provided:

Section 2. The expense of constructing said grade crossings at Monroe and Miami Avenues shall be borne by the Missouri, Kansas & Texas Railway Company, and said crossings shall be constructed by said Railway Company, plank in its tracks on the inside by planks thirty feet long and three inches thick, and one plank on the outside of its rails of the same length and thickness;

Section 3. The overhead crossing at Grand Avenue shall be by a two span iron bridge, resting on two abutments and one pier upon the right of way or grounds of the said Railway Company, according to plans to be prepared by the City, but subject to the approval of the said Railway Company.

Section 4. The crossing at Delaware Avenue shall be by planking the side tracks, as in section two (2) hereof, and by an ordinary dirt road under bridge number three hundred and twenty-six (326) of the said Railway Company, and between the bents on the north side of the present water way, the grade of said undergrade crossing to be about six feet above the bed of the present water course.

Section 5. In consideration of the Missouri, Kansas & Texas Railway Company agreeing to the opening of said streets across its said right of way, station grounds and tracks, aforesaid, and its paying for the construction of said grade crossings at Monroe and Miami Avenues as in section two herein provided, and its agreeing to the erection and maintenance of said bridge across its said right of way, station grounds and tracks at Grand Avenue, as aforesaid, and its further agreement to furnish, in the first instance the necessary material and labor for constructing said Grand Avenue bridge for the City, as well as the necessary labor and material for opening the crossing at Delaware Avenue, as in Section four hereof provided and its further agreement to contribute to the City one-half of the actual cost of said Grand Avenue bridge and said crossing at Delaware Avenue, the City hereby agrees to vacate and forever close the present grade crossing over the railway company's tracks at or near the [fol. 134] alley shown on the townsite commission's map, and lying between Grand Avenue and Choctaw Avenue, and extending through Block Number three hundred and fifty one (351), and also to vacate and close all other crossings over said railway company's tracks, except those herein provided for, and upon the completion of said crossings herein provided for, all other crossings, including the present grade crossings between Grand Avenue and Choctaw Avenue, shall be and hereby are vacated and closed; and the city further agrees that it will hereafter open no other street crossings or alleyways over, across or under the right of way, station grounds and tracks of the said railway company, except and provided it shall pay to the said railway company, as agreed stipulated and liquidated damages in any proceedings instituted by the said City for the opening or condemnation of a right of way over across or under the right of way, station grounds and tracks of the said railway company, any judgment, finding, verdict or assessment of damages of any court, jury, commission or other tribunal at the time having authority to assess said damages to the contrary notwithstanding, and whether for more or less than the agreed sum, namely:

Should Choctaw Avenue be opened over, across or under the right of way, tracks and station grounds of the railway company, the City shall pay the said railway company as agreed, stipulated

and liquidated damages, in the sum of Twenty Thousand Dollars (\$20,000.00).

Should any other crossing, alley way or street be opened across the railway company's premises through block number three hundred and fifty one (351), the City shall pay to the Railway Company, as agreed, stipulated and liquidated damages — the sum of fifteen thousand dollars (\$15,000.00).

Should any other street or alley way except Washington Avenue or Comanche Avenue, be opened across, over or under the right of way, station grounds, and tracks of the Railway Company, the City shall pay to the said Railway Company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars (\$10,000.00) for each and every other of said crossings, and in addition thereto damages equal to the actual value of any buildings or other improvements of the railway company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the railway company to contest the opening of any additional streets other than those herein provided for.

Section 6. The City of South McAlester shall and hereby agrees to pay to the said Missouri, Kansas & Texas Railway Company, one half of the actual cost of the construction of said Grand Avenue and Delaware Avenue crossings, as above provided for, when and as soon as the city of South McAlester has the lawful right to collect from the said Missouri, Kansas & Texas Railway Company, taxes levied against its right of way, buildings and other improvements or property in the city of South McAlester, in annual installments equal to the amounts of the taxes that may be collected by the said City from the said railway Company as taxes until said annual installments or sums so paid by the said City of South McAlester to the said Railway Company shall equal one-half of the actual cost of the [fol. 135] said Grand Avenue and Delaware Avenue crossings; provided that upon the completion of said crossings, the said railway Company shall render to the City a bill showing the actual cost of said crossings, and the proportion thereof so to be paid by the City.

Section 7. It is understood and agreed, however, that, if at any time, after five years from the date of the passage of this ordinance, the City of South McAlester shall desire an undergrade crossing at Cherokee Avenue, and the crossing at Delaware Avenue herein provided for shall be vacated and closed that the railway shall consent that said undergrade crossing at Cherokee Avenue shall be constructed, and contribute towards the construction thereof, one-half of the actual cost thereof, provided said crossing can be constructed at a cost not to exceed seven thousand and five hundred dollars (\$7,500.00) but should said crossing cost more than seven thousand and five hundred dollars (\$7,500.00) then said railway company shall in addition thereto, contribute the entire cost of said crossing over and above the sum of three thousand and seven hundred and fifty dollars (\$3,750.00) which is to be the maximum sum paid by

the City. And said crossing at Cherokee Avenue shall be made by planking the side tracks as provided in Section Two hereof, and by an ordinary dirt road under the main and other tracks of said road built upon the top of the fill of said road, and above the present grade of said Cherokee Avenue. The proportion of the cost of said Cherokee Avenue crossing to be paid by the City in annual installments in the manner provided in Section Six of this Ordinance, for other crossings; but the amount to be paid by the City in any one year to said Railway Company on account of the construction of said crossing not to exceed the amount of taxes so as hereinabove provided, to be paid in any one year by said railway company to the City. Provided, however, that should Delaware Avenue be closed, as hereinabove provided, the City of South McAlester shall have the right to pass its sewer pipes under the tracks of the said railway company at the place herein provided for. Delaware Avenue crossing said right of way, and the said Railway Company shall have the right to connect its sewers with the said sewers of the City of South McAlester at any point where said sewers shall cross through said right of way of said railway company, under plans and specifications to be approved by the said Missouri, Kansas & Texas Railway Company, and provided further, that it is hereby understood and agreed that should the City of South McAlester desire to construct such crossing at Cherokee Avenue across the right of way of said railway company, at any time, prior to the five years from the date of the passage of this Ordinance, it may do so, at its sole expense, under plans and specifications to be approved by the said Railway Company.

Section 8. The overgrade bridge crossing at Grand Avenue shall be and remain the exclusive property of the City of South McAlester.

Section 9. It is hereby understood and agreed that if at any time in the future, the City of South McAlester shall desire to open and establish a crossing of Comanche Avenue or Washington Avenue, or both of them, across the right of way and station grounds of the said Railway Company that it may do so upon the following terms: the crossing at Comanche Avenue shall be constructed as an under grade crossing under the main and other tracks of the said railway [fol. 136] company located upon the fill of said company, and above the present grade of Comanche Avenue, and a grade crossing over any side tracks of the said railway company, that now exist or that may be hereafter established upon the grade of said Comanche Avenue; and the crossing at Washington Avenue shall be an overhead bridge crossing, and both of said crossings, at Comanche Avenue and Washington Avenue, shall be constructed upon plans and specifications to be approved by the said railway Company, and at the sole cost and expense of the said City of South McAlester. The Railway Company hereby agreeing in consideration of the other matters and things expressed in this Ordinance, to waive any and all claims for damages because of the opening and establishing of either or both of said Comanche and Washington Avenue crossings.



And it is further understood and agreed that the said over grade bridge if it shall be built at Washington Avenue, shall be and remain the exclusive property of the City of South McAlester.

Section 10. This Ordinance shall be in full force and effect from and after its passage and publication, and the written acceptance of the same on the part of the Missouri, Kansas & Texas Railway Company, acting through its Vice President and General Manager, has been filed with the Clerk of the City of South McAlester.

Passed and approved this 8th day of November, 1901.

Fielding Lewis, Mayor. A. A. Powe, City Clerk.

The above entitled Ordinance, number 74 entitled "An Ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the townsite Commission's survey in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed, and for other purposes" passed by the Council and approved by the Mayor of the City of South McAlester, on the 8th day of November, A. D. 1901, hereby accepted by the said Missouri, Kansas & Texas Railway Company, and this acceptance is endorsed upon the original Ordinance and is to be filed with the Clerk of the City of South McAlester in accordance with Section 10 of said Ordinance.

Missouri, Kansas & Texas Railway Company, by A. A. Allen,  
Its Vice President & General Manager.

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[fol. 137] STATE OF OKLAHOMA,  
County of Pittsburg,  
City of McAlester, ss:

I, Rose D. Ewens, City Clerk in and for the City of McAlester, Oklahoma, hereby certify that the attached Ordinance No. 74, is a true and correct copy of Ordinance No. 74 as recorded in Ordinance Book No. 1 on pages No. 142 to 147 inclusive.

Witness my hand and seal this 15th day of October, 1921.

(Signed) Rose D. Ewens, City Clerk. (Seal.)



[fol. 138]

D'FT EX. 6

IN THE SUPERIOR COURT WITHIN AND FOR PITTSBURG COUNTY,  
STATE OF OKLAHOMA

No. —

MISSOURI, KANSAS &amp; TEXAS RAILWAY COMPANY, Plaintiff,

VS.

CITY OF McALESTER, Defendant

## Petition

1. Comes now the Missouri, Kansas & Texas Railway Company, plaintiff herein, and shows to the court that it is a corporation organized and existing under and by virtue of the laws of the State of Kansas, and does now and at all times hereinafter mentioned has owned, operated and controlled lines of railway into and through the states of Missouri, Kansas and Oklahoma, formerly Indian Territory, and amongst others a line of railway into and through the City of McAlester, Pittsburg County, Oklahoma, formerly Indian Territory, and that the defendant, the City of McAlester is a municipal corporation organized and existing under and by virtue of the laws of the State of Oklahoma.

2. For cause of action against defendant, plaintiff states that heretofore, to-wit: on the 8th day of November, 1901, this plaintiff entered into a contract with the City of South McAlester, Indian Territory, providing for street crossings across the right of way, station grounds and tracks of this plaintiff in said city upon the lines of certain streets as laid out by the Townsite Commission survey of the United States, which said contract is contained in Ordinance No. 74, passed and approved on said date by the Council of said City, a copy of which said ordinance is attached hereto, marked "Exhibit A" and made a part of this petition.

[fol. 139] 3. Further complaining, plaintiff states that it was provided in said contract amongst other things that Grand Avenue and Delaware Avenue should be opened across and over the right of way, station grounds and tracks of this plaintiff in said City by an overgrade crossing at Grand Avenue and by an undergrade crossing of the main and passing tracks and a grade crossing of the side tracks then constructed and thereafter to be constructed at Delaware Avenue, and that the said crossings should be constructed in accordance with the terms of said contract and that in consideration of the matters and things set up in said contract it was further agreed that the said City of South McAlester should pay this plaintiff one-half of the actual cost of the construction of said Grand Avenue and said Delaware Avenue crossings as therein provided, when and as soon as said City had the lawful right to collect from

this plaintiff taxes levied against its right of way, buildings and other improvements and other property in said City, said payment to be made in annual installments equal to the amounts of such taxes that might be collected by the said City from this plaintiff until said annual installments or sums so paid by said city to this plaintiff should equal one-half of the actual cost of the said Grand Avenue and the said Delaware Avenue crossings; and that upon the completion of said crossings this plaintiff should render to the said City a bill showing the actual cost of said crossings and the proportion thereof so to be paid by said City.

4. Further complaining, plaintiff states that it was further provided by the terms of said contract that if at any time after five years said City should desire an undergrade crossing at Cherokee Avenue that this plaintiff should consent to same, and that said City should contribute one-half to the cost of the construction thereof, provided said crossing should be constructed at not to exceed [fol. 140] a cost of \$7,500.00, but that if said crossing should cost more than \$7,500.00, this plaintiff should pay all additional cost over and above \$3,750.00, which sum should be the maximum to be paid by the said City, said crossing to be constructed as in said contract provided, and the proportion of the cost thereof to be paid by said City should be paid in the same manner as provided for the payment of its proportion of the cost of Grand Avenue and Delaware Avenue crossings, and plaintiff states that thereafter and about the year 1907, said Cherokee Avenue was opened and said crossing constructed in accordance with the terms of said contract. Plaintiff states that it was further provided by the terms of said contract that the amount to be paid by said City in any one year to this plaintiff on account of the construction of said crossing should not exceed the amount of taxes to be paid in any one year by this plaintiff to said City, as therein stated.

5. Further complaining, plaintiff states that said crossings at said Grand Avenue, Delaware Avenue and Cherokee Avenue were constructed in accordance with the terms of said contract at a total cost as follows:

Delaware Avenue.....	\$131.30
Grand Avenue.....	11,036.08
Cherokee Avenue.....	8,009.05
	<hr/>
	\$19,176.43

and that thereafter the City of McAlester, a corporation organized and existing under the laws in force in the Indian Territory having become the successor to the said City of South McAlester, this plaintiff presented to the Mayor and City Council its bill for one-half of the cost of the construction of said Delaware Avenue and said Grand Avenue crossings, and for \$3,750.00 for the cost of construction of Cherokee Avenue crossing, being the proportion agreed upon to be paid by said City of South McAlester, as provided in said con-

[fol. 141] tract, which proportionate amounts as shown by said bill were as follows:

Delaware Avenue.....	\$65.65
Grand Avenue.....	5,518.04
Cherokee Avenue.....	3,750.00
Total .....	<u>\$9,333.69</u>

and that said Mayor and City Council of said City of McAlester, by resolution adopted on the 12th day of April, 1909, accepted said bill as true and correct amount in each instance due from the said City of McAlester to this plaintiff on account of said construction of said crossing in accordance with the provisions of said contract, a copy of which resolution is hereto attached, marked "Exhibit B" and made a part of this petition.

6. Further complaining, plaintiff states that in accordance with the provisions of said contract, said City of McAlester, did on or about the 13th day of April, 1909, pay to this plaintiff the sum of \$1,815.00, to apply as a credit on the amount due from said City to this plaintiff because of the construction of said Delaware Avenue crossing, and said Grand Avenue crossing, as provided in said contract, said amount being equal to the amount of taxes charged against this plaintiff by said City for the year 1906, and plaintiff states that it credited said amount on the total amount of \$65.65 due from said City to this plaintiff because of the construction of said Delaware Avenue crossing, and on the total amount of \$5,518.04 due from said City to this plaintiff because of the construction of said Grand Avenue crossing, thus leaving no balance due this plaintiff on said Delaware Avenue crossing, and leaving a balance of \$3,768.69 due from said City to this plaintiff on said account because of the construction of said Grand Avenue crossing, which action of said City in making said payment is more fully shown by a resolution adopted by the Mayor and Council thereof on said date, a copy of which resolution is attached hereto, marked "Exhibit C" [fol. 142] and made a part of this complaint.

7. Further complaining, plaintiff states that in accordance with the provisions of said contract said City did on or about the 13th day of April, 1909, pay to this plaintiff the sum of \$1,815.00 to apply as a credit on the amount due from said City to this plaintiff because of the construction of said Cherokee Avenue crossing as provided in said contract, said amount being equal to the amount of taxes charged against this plaintiff by said City for the year 1907, and plaintiff states that it credited said payment on the total amount of \$3,750.00 due from said City to this plaintiff, because of the construction of said Cherokee Avenue crossing, leaving a balance due on said account of \$1,935.00, which action of said City in so making said payment is more fully shown by a resolution adopted on said date, a copy of which is attached hereto, marked "Exhibit D" and made a part of this complaint. Plaintiff states that the total

balance due this plaintiff from said City after receipt of said last above mentioned payment, was \$5,703.69.

8. Further complaining, plaintiff states that the defendant herein is the successor to said City of McAlester, and has succeeded to all of the rights, privileges, duties and liabilities of said City of McAlester as contained in said contract bearing Ordinance No. 74, as above alleged, and plaintiff states that it has paid as taxes assessed against it for the use and benefit of said defendant for the period beginning November 16, 1907, and ending June 30, 1909, the sum of \$3,701.99, which payment was made by voucher dated September 30, 1910, and plaintiff states that at the time said payment was made there then became due from the defendant to this plaintiff under the provisions of said contract a like sum to apply on said bill for the cost of the construction of said crossing, which [fol. 143] if paid would leave a balance of \$2,001.70 still due this plaintiff, but that defendant has wholly failed and refused to pay same or any part thereof, although often requested so to do by this plaintiff.

9. Further complaining, plaintiff states that it has paid to this defendant as taxes assessed against it for the use and benefit of said defendant for the period beginning July 1, 1909, and ending June 30, 1910, the further sum of \$7,930.73, which payment was made by voucher dated — day of —, 1910, and plaintiff states that at the time said payment was made there then became due from this defendant to this plaintiff under the provisions of said contract the further sum of \$2,001.70 in full of the balance of said bill on account of the construction of said crossings, but that defendant has wholly failed and refused to pay the same or any part thereof, although often requested so to do by this plaintiff.

10. Further complaining, plaintiff states that it has fully performed all of the terms and conditions of said contract by it to be performed, but that the defendant has wholly failed to perform the terms of said contract agreed by it to be performed.

11. Further complaining, plaintiff states that the total amount now due from this defendant to plaintiff is \$5,703.69, as above alleged, claim for which in writing with a full account of the items and verified by oath of the agent of this plaintiff, that the same is correct, reasonable and just, was presented by this plaintiff to the defendant on the — day of — in accordance with the statutes in such cases made and provided, and payment thereof has been refused by said defendant.

Wherefore, Plaintiff prays for judgment against the defendant for the sum of \$5,703.69, with interest from date of judgment at the rate of six per cent per annum, until paid, and for all of its costs herein laid out and expended.

(Signed) Clifford L. Jackson, Andrews & Day, Attorneys  
for Plaintiff.

[fol. 144]

## Ordinance No. 74

An ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys in lieu of other crossings now in use, and which, upon completion of the new crossings herein provided for, shall be vacated and closed, and for other purposes.

Be it ordained by the Council of the City of South McAlester:

Section 1. That Monroe Avenue, Grand Avenue, Delaware Avenue, and Miami Avenue, shall be and hereby are opened across and over the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the city of South McAlester by grade crossings at Monroe and Miami Avenues, and by an over-grade crossing at Grand Avenue, and by an undergrade crossing of the main and passing tracks at Delaware Avenue, and by a grade crossing of the side tracks now constructed, and those hereafter to be constructed at Delaware Avenue, all as hereinafter provided:

Section 2. The expense of constructing said grade crossings at Monroe and Miami Avenues shall be borne by the Missouri, Kansas & Texas Railway Company, and said crossings shall be constructed by said Railway Company, plank in its tracks on the inside by planks thirty feet long and three inches thick, and one plank on the outside of its rails of the same length and thickness:

Section 3. The overhead crossing at Grand Avenue shall be by a two span iron bridge, resting on two abutments and one pier upon the right of way or grounds of the said Railway Company, according to plans to be prepared by the City, but subject to the approval of the said Railway Company.

Section 4. The crossing at Delaware Avenue shall be by planking the side tracks, as in section two (2) hereof, and by an ordinary dirt road under bridge number three hundred and twenty-six (326) of the said Railway Company, and between the bents on the north side of the present water way, the grade of said undergrade crossing to be about six feet above the bed of the present water course.

Section 5. In consideration of the Missouri, Kansas & Texas Railway Company agreeing to the opening of said streets across its said right of way, station grounds and tracks, aforesaid, and its paying for the construction of said grade crossings at Monroe and Miami Avenues as in section two herein provided, and its agreeing to the erection and maintenance of said bridge across its said right of way, station grounds and tracks at Grand Avenue, as aforesaid, and its further agreement to furnish, in the first instance the necessary material and labor for constructing said Grand Avenue bridge for

the City, as well as the necessary labor and material for opening the crossing at Delaware Avenue, as in Section four hereof provided and its further agreement to contribute to the City one-half of the actual cost of said Grand Avenue bridge and said crossing at Delaware Avenue, the City hereby agrees to vacate and forever close the present grade crossing over the railway company's tracks at or near the alley shown on the townsite commission's map, and lying between Grand Avenue and Choctaw Avenue, and extending through Block Number three hundred and fifty one (351), and also to vacate and close all other crossings over said railway company's tracks, except those herein provided for, and upon the completion of said crossings herein provided for, all other crossings, including the present grade crossings between Grand Avenue and Choctaw Avenue, shall be and hereby are vacated and closed; and the city further agrees that it will hereafter open no other street crossings or alleyways over, across or under the right of way, station grounds and tracks of the said railway company, except and provided it shall pay to the said railway company, as agreed stipulated and liquidated damages in any proceedings instituted by the said City for the opening or condemnation of a right of way over across or under the right of way, station grounds and tracks of the said railway company, any judgment, finding, verdict or assessment of damages of any court, jury, commission or other tribunal at the time having authority to assess said damages to the contrary notwithstanding, and whether for more or less than the agreed sum, namely:

Should Choctaw Avenue be opened over, across or under the right of way, tracks and station grounds of the railway company, the City shall pay the said railway company as agreed, stipulated and liquidated damages, in the sum of Twenty Thousand Dollars (\$20,000.00).

Should any other crossing, alley way or street be opened across the railway company's premises through block number three hundred and fifty one (351), the City shall pay to the Railway Company, as agreed, stipulated and liquidated damages the sum of fifteen thousand dollars (\$15,000.00).

Should any other street or alley way except Washington Avenue or Comanche Avenue, be opened across, over or under the right of way, station grounds, and tracks of the Railway Company, the City shall pay to the said Railway Company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars (\$10,000.00) for each and every other of said crossings, and in, addition thereto damages equal to the actual value of any buildings or other improvements of the railway company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the railway company to contest the opening of any additional streets other than those herein provided for.

Section 6. The City of South McAlester shall and hereby agrees to pay to the said Missouri, Kansas & Texas Railway Company, one half



of the actual cost of the construction of said Grand Avenue and Delaware Avenue crossings, as above provided for, when and as soon as the city of South McAlester has the lawful right to collect from the said Missouri, Kansas & Texas Railway Company, taxes levied against its right of way, buildings and other improvements or property in the city of South McAlester, in annual installments equal to the amounts of the taxes that may be collected by the said City from the said railway Company as taxes until said annual installments or sums so paid by the said City of South McAlester to the said Rail- [fol. 146] way Company shall equal one-half of the actual cost of the said Grand Avenue and Delaware Avenue crossings: provided that upon the completion of said crossings, the said railway Company shall render to the City a bill showing the actual cost of said crossings, and the proportion thereof so to be paid by the City.

Section 7. It is understood and agreed, however, that, if at any time, after five years from the date of the passage of this ordinance, the City of South McAlester shall desire an undergrade crossing at Cherokee Avenue, and the crossing at Delaware Avenue herein provided for shall be vacated and closed that the railway shall consent that said undergrade crossing at Cherokee Avenue shall be constructed, and contribute towards the construction thereof, one-half of the actual cost thereof, provided said crossing can be constructed at a cost not to exceed seven thousand and five hundred dollars (\$7,500.00) but should said crossing cost more than seven thousand and five hundred dollars (\$7,500.00) then said railway company shall in addition thereto, contribute the entire cost of said crossing over and above the sum of three thousand and seven hundred and fifty dollars (\$3,750.00) which is to be the maximum sum paid by the City. And said crossing at Cherokee Avenue shall be made by planking the side tracks as provided in Section Two hereof, and by an ordinary dirt road under the main and other tracks of said road built upon the top of the fill of said road, and above the present grade of said Cherokee Avenue. The proportion of the cost of said Cherokee Avenue crossing to be paid by the City in annual installments in the manner provided in Section Six of this Ordinance, for other crossings; but the amount to be paid by the City in any one year to said Railway Company on account of the construction of said crossing not to exceed the amount of taxes so as hereinabove provided, to be paid in any one year by said railway company to the City. Provided, however, that should Delaware Avenue be closed, as hereinabove provided, the City of South McAlester shall have the right to pass its sewer pipes under the tracks of the said railway company at the place herein provided for. Delaware Avenue crossing said right of way, and the said Railway Company shall have the right to connect its sewers with the said sewers of the City of South McAlester at any point where said sewers shall cross through said right of way of said railway company, under plans and specifications to be approved by the said Missouri, Kansas & Texas Railway Company, and provided further, that it is hereby understood and agreed that should the City of

South McAlester desire to construct such crossing at Cherokee Avenue across the right of way of said railway company, at any time, prior to the five years from the date of the passage of this Ordinance, it may do so, at its sole expense, under plans and specifications to be approved by the said Railway Company.

Section 8. The overgrade bridge crossing at Grand Avenue shall be and remain the exclusive property of the City of South McAlester.

Section 9. It is hereby understood and agreed that if at any time in the future, the City of South McAlester shall desire to open and establish a crossing of Comanche Avenue or Washington Avenue, or both of them, across the right of way and station grounds of the said Railway Company that it may do so upon the following terms: The crossing at Comanche Avenue shall be constructed as an under-[fol. 147] grade crossing under the main and other tracks of the said railway company located upon the fill of said company, and above the present grade of Comanche Avenue, and a grade crossing over any side tracks of the said railway company, that now exist or that may be hereafter established upon the grade of said Comanche Avenue; and the crossing at Washington Avenue shall be an overhead bridge crossing, and both of said crossings, at Comanche Avenue and Washington Avenue, shall be constructed upon plans and specifications to be approved by the said railway Company, and at the sole cost and expense of the said City of South McAlester. The Railway Company hereby agreeing in consideration of the other matters and things expressed in this Ordinance, to waive any and all claims for damages because of the opening and establishing of either or both of said Comanche and Washington Avenue crossings. And it is further understood and agreed that the said over grade bridge if it shall be built at Washington Avenue, shall be and remain the exclusive property of the City of South McAlester.

Section 10. This Ordinance shall be in full force and effect from and after its passage and publication, and the written acceptance of the same on the part of the Missouri, Kansas & Texas Railway Company, acting through its Vice President and General Manager, has been filed with the Clerk of the City of South McAlester.

Passed and approved this 8th day of November, 1901.

Fielding Lewis, Mayor. A. A. Powe, City Clerk.

The above entitled Ordinance, number 74 entitled "An Ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the townsite Commission's survey in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed, and for other purposes" passed by the Council and approved by the Mayor of the City of South McAlester, on the 8th day of November, A. D. 1901, hereby accepted by the said Missouri, Kansas & Texas Railway Com-



pany, and this acceptance is endorsed upon the original Ordinance and is to be filed with the Clerk of the City of South McAlester in accordance with Section 10 of said Ordinance.

Missouri, Kansas & Texas Railway Company, by A. A. Allen,  
Its Vice President & General Manager.

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[fol. 148]                      EXHIBIT B TO PETITION

M., K. & T. Resolution No. 2—Omitted; printed side page 130 ante

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[fol. 149]                      EXHIBIT C TO PETITION

M., K. & T. Resolution No. 3—Omitted; printed side page 131 ante

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[fol. 150]                      EXHIBIT D TO PETITION

M., K. & T. Resolution No. 4—Omitted; printed side page 132 ante

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[fol. 151] IN THE SUPERIOR COURT WITHIN AND FOR PITTSBURG  
COUNTY, STATE OF OKLAHOMA

No. —

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff.

vs.

THE CITY OF McALESTER, Defendant

ANSWER

Comes now the defendant by its duly appointed, qualified and acting attorney, and for answer to plaintiff's petition filed herein admits each and every material allegation thereof, and agrees that judgment may be rendered in favor of the plaintiff and against this defendant for the sum of \$5,703.69, with interest from date of judgment at six per cent. until paid, and for all costs of this suit, and prays the court that it be provided in said judgment that same shall be paid by defendant in three equal annual installments.

Wherefore, having fully answered, defendant prays that it be adjudged to go hence without day with its costs in this behalf laid out and expended.

T. D. Davis, Attorney for Defendant.

A resolution authorizing and instructing the City Attorney to appear on behalf of the City of McAlester, defendant in a suit entitled Missouri, Kansas & Texas Railway Company, plaintiff, v. The City of McAlester, defendant, now pending in the Superior Court of Pittsburg County, Oklahoma, and to file answer admitting the allegations of plaintiff's petition and confessing judgment for the amount sued for, interest and costs, and for other purposes.

Whereas, on the 5th day of February, 1912, the Missouri, Kansas & Texas Railway Company commenced suit in the Superior Court within and for Pittsburg County, Oklahoma, against the City of McAlester, which case bears No. — on the docket of said court, in which suit the said Railway Company is seeking to recover from said City the sum of \$5,703.69, as a balance due on account of the construction of street crossings over the right of way, station grounds and tracks of said Railway Company in said City in accordance with the terms of a contract entered into between the Railway Company and said City on the 8th day of November, 1901, as contained in Ordinance No. 74, which ordinance is entitled as follows: "An ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes," and,

Whereas, it appears that heretofore, to-wit: on the 14th day of August, 1911 said Railway Company presented to the then Mayor and Council of said City its bill against the City for its proportionate share of said expenses provided under the terms of said contract to be paid by said City, which bill was by said Mayor and council found to [fol. 153] be just and true and due from it to said Railway Company, all of which more fully appears from a resolution adopted by them on the — day of —, and,

Whereas, it appears that in the month of April, 1909, said City paid on said bill the sum of \$3,630.00 to said Railway Company, thereby leaving a balance due in the sum of \$5,703.69.

Be it therefore resolved by the City Council of the City of McAlester, that T. D. Davis the duly elected, qualified and acting City Attorney of said City, be and he is hereby authorized and instructed to appear on behalf of said City in said suit in said Court, and file answer therein admitting said indebtedness and confessing judgment therefor for the full amount sued for with interest from date of judgment at six per cent per annum until paid, and costs.

Passed and approved this 8th day of March, 1912.

Pete Hanraty, Mayor. J. M. Gannaway, City Clerk.

STATE OF OKLAHOMA,  
Pittsburg County,  
City of McAlester, ss:

I, J. M. Gannaway, the duly appointed, qualified and acting City Clerk of the City of McAlester hereby certify that the above and foregoing is a correct, full and true copy of a resolution duly passed by the City Council, and approved by the Mayor, of the City of McAlester, as the same appears of record in my office, passed and approved on the date therein named.

J. M. Gannaway, City Clerk of the said City of McAlester.

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[fol. 154] IN THE SUPERIOR COURT WITHIN AND FOR PITTSBURG  
COUNTY, STATE OF OKLAHOMA

No. 1098

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff,

vs.

CITY OF McALESTER, Defendant

JOURNAL ENTRY OF JUDGMENT

Now on this 17th day of April 1912 same being one of the regular judicial days of the regular April 1912 term of this court, the above entitled cause comes on for hearing, and good and lawful service of summons having been heretofore had on defendant herein, both parties being present and it appearing to the court that defendant has filed answer herein admitting all the allegations of plaintiff's petition and agreeing that judgment may be entered in its favor for the amount sued for with interest from the date of judgment and costs, and the court having seen all the pleadings on file and being fully advised in the premises.

It is considered, ordered and adjudged that the plaintiff, Missouri, Kansas & Texas Railway Company, have and recover of and from the defendant, City of McAlester, the sum of Five Thousand Seven Hundred Three and 69/100 (\$5,703.69) Dollars, with interest thereon from the date thereof at six per cent per annum until paid, and all costs incurred in this case.

W. C. Liedtke, Judge.

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[fols. 155 & 156] CLERK'S CERTIFICATE

STATE OF OKLAHOMA,  
Pittsburg County, ss:

I, H. I. Aston, do hereby certify that I am the Court Clerk in and for Pittsburg County, State of Oklahoma, and that the foregoing is a

true, correct and complete copy of Petition, Answer and Journal Entry in Case No. 1098, Missouri, Kansas & Texas Railway Company vs. City of McAlester, in the Superior Court in and for Pittsburg County, Oklahoma, as the same appears of record and on file in my office.

Witness my hand and seal at McAlester, Oklahoma, this the 19th day of May, 1922.

H. I. Aston, Court Clerk, by J. T. Featherston, Deputy.  
(Seal.)

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[fol. 157] BEFORE THE CORPORATION COMMISSION OF THE STATE OF  
OKLAHOMA

[Title omitted]

### FINDING OF FACTS, OPINION, AND ORDER

On September 29th, 192-, application was filed with the Corporation Commission by petition signed by the Mayor, City Attorney, City Manager and others, asking the Corporation Commission to require the Missouri, Kansas & Texas Railway Company to install an underpass under their tracks and provide highway crossing their right-of-way on what is known as Comanche Avenue in the City of McAlester. The case was docketed and set for hearing but was postponed from time to time by request of applicants and defendant. It was finally heard before Commissioner Russell in the City Hall of McAlester on May 10th, 1922, all parties interested being duly notified. J. W. Horton, City Attorney and E. M. Frye, City Manager, representing complainants; M. D. Green, Atty., and G. Z. Hopkins, Assistant Chief Operating Officer, representing the defendant, and A. I. Thompson for the Corporation Commission.

It was disclosed at the hearing that McAlester was subdivided in four wards, the railroads being the boundary; the Rock Island traversing through the city East and West and the M. K. & T. North and South, the passenger depot being located at the railroad crossing in the S. E. corner. The testimony further disclosed that [fol. 158] a large population of the city of McAlester lived both East and West of the proposed crossing and the opening prayed for under the M. K. & T. tracks on Comanche Avenue would be of great benefit to the citizens of McAlester, and especially to the citizens living in that portion South of the Rock Island and West of the M. K. & T.

A copy of the City Ordinance No. 74 was presented showing an agreement between the City of McAlester and the M. K. & T. Railway in the City of McAlester. This ordinance was passed by the City on the 8th day of November, 1901, which provided for certain crossings and how the city would acquire other crossings and provided for Comanche Avenue crossing, to-wit:

"Should any other street or alley way except Washington Avenue or Comanche Avenue, be opened across, over or under the right-of-

way, station-grounds, and tracks of the railway company, the City shall pay to the said railway company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars (\$10,000.00) for each and every other of said crossings, and in addition thereto damages equal to the actual value of any buildings or other improvements of the railway company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the railway company to contest the opening of any additional streets other than those herein provided for."

The railway company filed brief covering the above stipulation, contending that the Commission was without jurisdiction in reference to this application, setting forth various decisions. The Commission interprets the 1919 Session Laws to give them full jurisdiction over highway crossings where highway passes over or under, or at grade of steam or electric railroads or railways.

The evidence disclosed that the crossing asked for is essential: [fol. 159] that the Katy South from the Rock Island crossing on a high fill for a major portion of the distance in the corporate limits. The topography in the vicinity of the proposed crossing makes Comanche Avenue the most practical route to and from the business district of McAlester, especially from the South half of the city; that the present highways in the vicinity of Comanche are inadequate and hazardous and are located, to-wit: From Comanche Boulevard Delaware Avenue is located 1569½' North. This crossing is an underpass and takes care of the drainage from Sand Creek and the sewerage from the City. The nearest crossing South of Comanche Avenue is on Ottawa Avenue. It is a grade crossing and is located 730.5' South of Comanche Avenue. If Comanche Avenue was provided it would be of material benefit for East and West traffic and especially to residents living in the S. W. portion of the City.

The Commission after giving all facts due consideration and realizing the necessity of grade separation where same is practical, it is therefore ordered that the M. K. & T. Railway Company prepare a plan for reinforced concrete subway on Comanche Avenue as prayed for by applicants, the plan to provide for two openings of not less than 14' horizontal and 12' vertical clearance, together with an estimated cost showing quantities. The plan for underpass to show the location of drainage and industrial tracks, the track to conform to highway grade on Comanche Avenue. The above estimate and plan is to be filed with the Mayor of McAlester and the Corporation Commission on or before August 15th, 1922.

It is furthered ordered that on the failure of the M. K. & T. Railway Company and the City of McAlester to agree on the apportion of cost in the construction of the underpass on Comanche Avenue, the Commission will hear further evidence covering the division of [fols. 160 & 161] cost or change in plan, the date to be set when the applicants or defendants advise the Commission that they are unable to agree as to the division of cost.

It is further ordered that the M. K. & T. Railway Company shall have the underpass on Comanche Avenue in the City of McAlester constructed and opened for traffic within 90 days from the date the City of McAlester has arranged to pay their apportion of cost of constructing subway.

Done at Oklahoma City, Oklahoma, this 16th day of June, 1922.  
Corporation Commission of Oklahoma. Campbell Russell,  
Chairman. Art. L. Walker, Commissioner. ———, Commissioner.

Attest: G. F. Smith, Secretary.

[fol. 162] BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

[Title omitted]

NOTICE OF APPEAL, REQUEST FOR TRANSCRIPT OF RECORD, AND FOR SUPERSEDEAS

To the Honorable Corporation Commission of the State of Oklahoma:

The undersigned, Missouri, Kansas & Texas Railway Company, respectfully represents and shows that heretofore, to-wit: on September 29, 1921, complaint was filed in the above entitled and numbered cause for an order for an underhead crossing under the right of way and tracks of said railway company at the point where Comanche Avenue intersects said right of way at the easterly and westerly boundary lines of said right of way in the City of McAlester, Oklahoma, and that a hearing was had therein before Chairman Russell of this Commission in the City Hall at McAlester, Oklahoma, on May 10, 1922, and on June 16, 1922, this Commission handed down its final order and decision therein bearing No. 2071, which is of record in the office of this Commission and reference to which is hereby made; that by the terms of said Final Order, your petitioner, the defendant, is directed and required to prepare plans for a proposed extension of said Comanche Avenue under its said tracks and across the said premises and that your petitioner and the City of McAlester are ordered to undertake and agree on an apportionment of the cost thereof, and your petitioner is required to have said underhead crossing completed and opened for traffic within ninety days from the date the City has arranged to pay its portion of the cost, although the right to effect such an extension of Comanche Avenue across your petitioner's premises has never yet been secured by condemnation proceedings or otherwise, and by contract ordinance No. 74 of the City of McAlester, entered into between said City and your petitioner on November 8, 1901, provides that if said Avenue should ever be opened and established across your petitioner's premises, it should be done by an undergrade crossing under the main tracks and grade crossing over the side tracks on plans to be approved by your petitioner but at the sole cost and expense of the City.

Your petitioner is dissatisfied with said Final Order No. 2071 and feels and deems itself aggrieved by such action and order of this Commission and desires to prosecute an appeal therefrom to the Supreme Court of the State of Oklahoma and to have said order suspended pending decision of said appeal.

Wherefore, pursuant to the provisions of the Constitution of the State of Oklahoma, your petitioner, the defendant herein respectfully gives notice of its intention to appeal and requests that the Chairman of this Commission, under the seal of the Commission, shall certify to the Supreme Court of the State of Oklahoma all the facts upon which said Final Order No. 2071 was based and which may be essential for the proper decision of the appeal, together with all evidence introduced before or considered by the Commission and that the Commission file with the record of the case in the Supreme Court and as a part thereof a written statement of the reasons upon which the action appealed from was based; your petitioner further requests and prays the Commission that it be permitted to suspend or supersede said Final Order No. 2071 on such reasonable and just terms as to this Commission may [fol. 164 & 165] seem proper and that this Commission issue its order accordingly and fix the amount and terms of any suspending or supersedeas bond which may be required to be executed by your petitioner and that your petitioner be given a reasonable time within which to comply with said order of suspension and supersedeas.

Dated this 12th day of October, 1922.

Missouri, Kansas & Texas Railway Company, by M. D. Green,  
Its Attorney.

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[fol. 166] BEFORE THE CORPORATION COMMISSION OF THE STATE OF  
OKLAHOMA

[Title omitted]

ORDER ALLOWING APPEAL—Filed Oct. 23, 1922

On June 16, 1922, the Corporation Commission made and entered its Order No. 2071 in which the Missouri, Kansas & Texas Railway Company was ordered, directed and required to prepare plans for a reinforced concrete subway at the intersection of Comanche Avenue and the railway company's right-of-way in the City of McAlester, Oklahoma, together with an estimated cost showing quantities, said estimate and plan to be filed with the Mayor of McAlester and the Corporation Commission on or before August 15, 1922. It was further ordered that on the failure of the Missouri, Kansas & Texas Railway Company and the City of McAlester to agree on the apportionment of cost in the construction of said underpass, that the Commission would set a date for the hearing of further evidence covering the division of cost or any change in plan which



might be suggested by either the railway company or the City of McAlester.

On the 13th day of October, 1922, the Missouri, Kansas & Texas Railway Company files with the Commission its notice of appeal, request for transcript of record, and for an order superseding the effectiveness of the Commission's order No. 2071 pending an appeal to the Supreme Court of the State of Oklahoma.

Now on this the 23rd day of October, 1922, the Commission having under consideration said petition and request for transcript and supersedeas, is of the opinion and finds that an appeal should be allowed as prayed for by the railway company and that a true and correct transcript of all the proceedings had before the Commission in said cause should be prepared and filed with the Clerk [fol. 167] of the Supreme Court of the State of Oklahoma for use in the appeal to that court, but that the request for supersedeas staying the effectiveness of the requirements of said Order, should be in all things denied and overruled.

It is therefore the order of the Commission, premises considered, that the Missouri, Kansas & Texas Railway Company be and it is hereby allowed its appeal to the Supreme Court of the State of Oklahoma, and that a true and correct copy of the records and proceedings had before the Commission in said matter be prepared and filed in the Supreme Court of the State of Oklahoma for use on said appeal.

It is the further order of the Commission that the request and application for a writ of supersedeas staying the effectiveness of said Order No. 2071 be and the same is hereby in all things overruled and denied.

Done at Oklahoma City this the 23rd day of October, 1922.

Corporation Commission of Oklahoma. ———, Chairman. Art L. Walker, Commissioner. E. R. Hughes, Commissioner.

Attest: G. F. Smith, Sec'y.

[fol. 186]

#### CHAIRMAN'S CERTIFICATE

UNITED STATES OF AMERICA,

State of Oklahoma, ss:

I, Campbell Russell, Chairman of the Corporation Commission, do hereby certify that the above and foregoing is a full, true and complete transcript of the record made before the Corporation Commission in Cause No. 4410, in which Order No. 2071 was promulgated; and I further certify that the said record contains all of the pleadings, evidence taken and introduced, offered or considered by the Commission, and objections thereto, all motions, exceptions, rulings and orders of the Commission, made in said cause, and all of the facts upon which said Order No. 2071 was based, together with a written statement of the reasons upon which said



order was based; and that the same is a full, true, correct and complete transcript of the record in said cause.

Given under my hand and the seal of the Corporation Commission of the State of Oklahoma, this the 14th day of November, 1922.

Campbell Russell, Chairman.

Attest: G. F. Smith, Secretary. (Seal Corporation Commission of Oklahoma.)

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[fol. 169] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ARGUMENT AND SUBMISSION—Filed June 12, 1923

And now on this day the above cause is argued orally and submitted on the record, briefs and oral argument.

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[fol. 170] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

JUDGMENT—Dec. 11, 1923

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the order of the Corporation Commission in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the order of the Corporation Commission in the above cause, be, and the same is hereby affirmed.

Opinion by Harrison, J.

Johnson, C. J., Kennamer, Branson, and Cochran, JJ., concur.

[fol. 171] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

OPINION—Filed Dec. 11, 1923

Syllabus

1. The various sections of article 9 of the Constitution create the Corporation Commission, confer and define certain duties and powers and vest it with certain specific jurisdiction, and section 19 Id. after conferring certain jurisdiction upon the Corporation Commission to control corporations within the

state, provides: "The Commission may be vested with such additional powers and charged with such duties \* \* \* as may be prescribed by law."

2. Pursuant to the power conferred upon it by the above constitutional provision, the Legislature by Chapter 15, C. L. 1921, vested the Corporation Commission with additional jurisdiction and powers and charged it with additional duties, among [fol. 172] which are as follows: "The Corporation Commission is given full jurisdiction over all public highway crossings where same cross steam or electric railroads or railways within the State of Oklahoma."
3. Under the foregoing section, in connection with other sections of chapter 15, C. L. 1921, the Corporation Commission has full jurisdiction over all public highways crossings and has authority to order such crossings to be constructed, as it may be petitioned by proper authorities to do, and authority to make an estimate of the cost of construction of such crossings and to assess the cost of same against the petitioners and the railroad company, according to its sound discretion and judgment, and to enforce, as provided by law, its orders for the construction of same.
4. Article 2, section 24 of the Constitution provides specifically: "Private property shall not be taken or damaged for public use without just compensation." Hence where a railroad company owns the fee in its right of way, such right of way cannot be appropriated or damaged for public use without compensation, either by amicable settlement or by proper condemnation proceedings.
5. Where a city has selected the point for the construction of a grade crossing over a railroad, and upon a petition of the Corporation Commission has ordered the railroad company<sup>n</sup> to construct such grade crossing, it cannot enforce obedience to such order until after the question of damage to the fee in its right of way has been determined, either by amicable settlement or by proper condemnation proceedings. In such case it is im-[fol. 173] material whether the estimate of *of* cost of construction of such crossing be made first, or whether the estimate of damage to the right of way be made first, but it is necessary that the point of crossing should be made before either could be accurately made. Provided, however, that the order of the Corporation Commission for the construction of such crossing cannot be enforced in any event, until the damage to the right of way has been determined by amicable settlement or by proper condemnation proceedings.

Appeal from Order of the Corporation Commission

Affirmed

M. D. Green, H. L. Smith, for appellant.  
E. S. Ratliff, Horton & Gill, for appellees.

[fol. 174] HARRISON, J.:

This action involves the jurisdiction of the Corporation Commission to order crossings over or under transportation lines where there is a public demand for same. The action in question arose out of a demand by the City of McAlester for a crossing under Comanche Avenue in said city, to be constructed, in part at least, by the plaintiff in error, M., K. & T. Ry. Co.

The facts necessary to reveal the material circumstances in the case may be observed from a resolution passed by the Council of said City, Sept. 19, 1921, and final hearing had thereon May 10, 1922, together with the Finding of Facts, Opinion and Order of the Corporation Commission which are as follows:

"Whereas, Comanche Avenue is one of the public highways and streets of the Incorporated City of McAlester, Oklahoma, and one of the main thoroughfares and highways connecting and between the Second and Third Wards of said City, each of said wards containing a large population, and having located in each of them public schools of the City, the public school of the Third Ward being located on said Comanche Avenue, and the said Comanche Avenue running through the central portions of said Second and Third Wards; and, whereas, there exists at the intersection of said Comanche Avenue and the roadbed, tracks and right of way of the Missouri, Kansas & Texas Railway Company, a steam railway company, a very high embankment which completely obstructs passageway along said Comanche Avenue between the said Second and Third Wards and many other portions of said City, thereby greatly impeding the travel in said City and access of citizens to and from different points therein [fol. 175] and communication with each other, and retarding the improvement and development of said City; and, whereas, by reason of the premises a public necessity exists for a crossing upon, over or under the said track, roadbed and right of way of said Missouri, Kansas & Texas Railway Company where said Comanche Avenue intersects therewith.

Now, therefore, be it resolved by the Mayor and City Council of the City of McAlester, Oklahoma, that the said City of McAlester make application to the Corporation Commission of the State of Oklahoma for an order requiring said Missouri, Kansas & Texas Railway Company and Chas. E. Schaff, its Receiver operating its properties, to construct and maintain a public highway crossing at the intersection of Comanche Avenue with the tracks of said railway Company as aforesaid; and that the City Manager and the City Attorney of said City are hereby directed, authorized and empowered to, for and in the name of said city to make said application to said Corporation Commission and to do all acts and things necessary and proper in and about the presentation and prosecution of said application.

Passed and approved this 19th day of September 1921.

Hearing was had in the City Hall of the City of McAlester on May 10, 1922."

### “Findings of Facts, Opinion, and Order

On September 29th, 1921, application was filed with the Corporation Commission by petition signed by the Mayor, City Attorney, City Manager and others, asking the Corporation Commission to require the *the* Missouri, Kansas & Texas Railway Company to install an underpass under their tracks and provide highway crossing their [fol. 176] right of way on what is known as Commanche Avenue in the City of McAlester. The case was docketed and set for hearing but was postponed from time to time by request of applicants and defendant. It was finally heard before Commissioner Russell in the City Hall of McAlester on May 10th, 1922, all parties interested being duly notified. J. W. Horton, City Attorney, and E. M. Frye, City Manager, representing complainants; M. D. Green, Atty. and Z. G. Hopkins, Assistant Chief Operating Officer, representing the defendants, and A. I. Thompson, for the Corporation Commission.

It was disclosed at the hearing that McAlester was subdivided in four Wards, the Railroads being the boundary; the Rock Island traversing through the City east and west and the M. K. & T. North and south, the passenger depot being located at the railroad crossing in the S. E. corner. The testimony further disclosed that a large population of the City of McAlester lived both east and west of the proposed crossing and the opening prayed for under the M. K. & T. tracks on Commanche Avenue would be of great benefit to the citizens of McAlester, and especially to the citizens living in that portion south of the Rock Island west of the M. K. & T.

A copy of the City Ordinance No. 74 was presented showing an agreement between the City of McAlester and M. K. & T. Railway in the City of McAlester. This ordinance was passed by the City on the 8th day of November, 1901, which provided for certain crossings and how the City could acquire other crossings, and provided for Commanche Avenue crossing, to wit:

“Should any other street or alley way except Washington or Commanche Avenue, be opened across, over or under the right of way, station grounds, and tracks of the Railway Company, the City [fol. 177] shall pay to the said Railway Company as agreed, stipulated and liquidated damages, the sum of Ten Thousand dollars \$10,000.00 for each and every other of said crossings, and in addition thereto damages equal to the actual value of any buildings or other improvements of the Railway Company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the Railway Company to contest the opening of any addit-onal streets other than those herein provided for.”

The Railway Company filed brief covering the above stipulation, contending that the Commission was without jurisdiction in reference to this application, setting forth various decisions. The Commission interprets the 1919 Session Laws to give them full jurisdic-

tion over highway crossings where highway passes over or under, or at grade of steam or electric railroads or railways.

The evidence disclosed that the crossing asked for is essential; that the Katy south from the Rock Island crossing on a high fill for a major portion of the distance in the corporate limits. The topography in the vicinity of the proposed crossing makes Commanche Avenue the most practicable route to and from the business district of McAlester, especially from the south-half of the City; that the present highways in the vicinity of Commanche are inadequate and hazardous and are located, to wit; From Commanche Boulevard, Delaware Avenue is located 1,569½' north. This crossing is an underpass and takes care of the drainage from Sand Creek and the sewerage from the City. The nearest crossing south of Commanche Avenue is on Ottawa Avenue. It is a grade crossing and is located 730.5' south of Comanche Avenue. If Comanche Avenue was provided it would be of material benefit for east and west traffic and especially to residents living in the S. W. portion of the City.

The Commission after giving all facts due consideration realizing [fol. 178] the necessity of grade separation where the same is practical, it is therefore ordered that the M., K. & T. Railway Company prepare a plan for reinforced concrete subway on Comanche Avenue as prayed for by applicants, the plan to provide for two openings of not less than 14' horizontal and 12' vertical clearance, together with an estimated cost showing quantities. The plan for underpass to show the location of drainage and industrial tracks, the track to conform to highway grade on Commanche Avenue. The above estimate and plan is to be filed with the Mayor of McAlester and the Corporation Commission on or before August 15, 1922.

It is further ordered that on the failure of the M., K. & T. Railway Company and the City of McAlester to agree on the apportion of cost in the construction of underpass on Commanche Avenue, the Commission will hear further evidence covering the division of the cost or change in plan, the date to be set when the applicants or defendants advise the Commission that they are unable to agree as to the division of cost.

It is further ordered that the M., K. & T. Railway Company shall have the underpass on Comanche Avenue in the City of McAlester constructed and opened for traffic within 90 days from the date the City of McAlester has arranged to pay their apportion of cost of constructing the subway.

Done at Oklahoma City, Oklahoma, this 16th day of June, 1922."

Plaintiff in error complains of this order upon two material grounds:

First. Lack of jurisdiction.

Second. Lack of sufficient facts to warrant the exercise of jurisdiction, if by law it has jurisdiction.

The authority under which the Corporation Commission acted in this particular, was conferred by an act of the Legislature, 1919, pursuant to authority vested in it by section 19, article 9 of the Constitution.

The various sections of article 9 of the Constitution create the Corporation Commission, define certain specific duties and powers, and section 19 Id. after conferring certain jurisdictions upon the [fol. 179] Corporation Commission to control corporations within the State provides:

"The Commission may be vested with such additional powers and charged with such other duties \* \* \* as may be prescribed by law."

The above provision constitutes a special grant of authority to the Legislature to confer additional jurisdiction, powers and duties upon the Corporation Commission that are specifically conferred by the Constitution, and pursuant to authority this conferred upon it, the Legislature by Act of S. L. 1919, page 88, vested the Corporation Commission with the additional jurisdiction, powers and duties provided for in said act, the section of said act which controls in the present case, (the same being section 3491 C. L. 1921) is as follows:

"The corporation commission is given full jurisdiction over all public highway crossings, where same cross steam or electric railroads or railways within the State of Oklahoma."

This section was construed by this court in *M. K. & T. Ry. Co. v. State et al.*, — Okla., —, 200 Pac. 208, and there given literal interpretation of the wording of the statute. In as much as the first section of the act, the same being section 3491, supra, which says:

"The Corporation Commission is given full jurisdiction over all public highway crossings."

could not mean anything else than that no other administrative board or body has jurisdiction over such matters, the fact that section 2 of the act authorizes the Corporation Commission in overgrade or undergrade public highway crossings to make an assignment of the cost of maintenance of the same and the fact that in the express words the assignment of the maintenance and costs of such crossings shall be left to the discretion of the corporation commission, supports and carries out the original idea suggested and provided for in the first [fol. 180] section, the only limitation placed upon the corporation commission being that no more than 50 per cent of the cost of maintenance shall be assessed against the municipality and the further fact that under section 3, hearings had in such matters shall be under the same rules and procedure, etc., as in other matters and the same right of appeal given to the Supreme Court as in other cases, emphasize the intention of the Legislature to confer jurisdiction in such matters upon the Corporation Commission alone.

To acquire jurisdiction in such matter the Corporation Commission is of course confined to its ordinary rules and common reason, if it be an individual's rights affected, perhaps the petition of the individual would be sufficient, if it be a municipality, jurisdiction could be acquired by the ordinary rules as to administrative board authorized to represent municipalities in such matters, in the case at bar, it is a city council, through its city attorney.

We hold, therefore, that there was no question as to the corporation commission having properly acquired jurisdiction and no question under the statute but that it had authority to exercise jurisdiction.

This view of the question of jurisdiction is supported by *M. K. & T. Ry. Co. v. State*, — Okla. —, 200 Pac. 208, also by *C. R. I. & P. Ry. Co. v. Taylor*, 79 Okla. 142, 192 Pac. 349, and supported as to the comparatively every phase involved, in an exhaustive opinion by Mr. Justice Holmes in 65 L. Ed. 322. Mr. Justice Holmes in the body of the opinion after deciding that the right of states to regulate railroad crossings is a proper exercise of police power, has the following to say in regard to the establishment and maintenance of grade crossings:

"Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of [fol. 181] automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has not bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & R. G. R. Co.* 250 U. S. 241, 246, 63 L. Ed. 958, 962, 39 Sup. Ct. Rep. 450. To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are sub-



ject to the possible exercise of the sovereign right. *Denver & R. G. Co. v. Denver*, 250 U. S. 241, 244, 63 L. Ed. 958, 961, 39 Sup. Ct. Rep. 450; *Union Dry Goods Co. v. Georgia Public Service Corp.* 248 [fol. 182] U. S. 372, 63 L. Ed. 309, 9 A. L. R. 1420, P. U. R. 1919 C, 60, 39 Sup. Ct. Rep. 117, *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265; *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. Rep. 341; *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. Ed. 274, 278, 26 Sup. Ct. Rep. 127. If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortune the stopping may produce. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396, 64 L. Ed. 323, P. U. R. 1920 C. 579, 40 Sup. Ct. Rep. 183.

"Intelligent self interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous. Many details as to the particular situation of this road are disposed of without the need of further mention by what we have said thus far."

This case like the case of *C. R. I. & P. v. Taylor*, supra, clearly shows that the regulation of street railway crossings and maintenance in such form as to be safe to the public, is the proper exercise of the police power of the state, and the *Erie R. R. Co. v. Board of Public Utilities*, supra, the *Southern Ry. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050, clearly support the theory that if the state has power, in the absence of contract as to same it has power to force a railroad to construct such crossings at its own expense and without compensation for the use of their right of way. But in the case at bar it is conceded that there was no contract between the federal government and the *M. K. & T. Ry. Co.* in its charter, that the *M. K. & T. Ry.* should grant this crossing without compensation for the damage done to its right of way. Section 24, Article 2 of the State Constitution provides specifically:

"Private property shall not be taken or damaged for public use [fol. 183] without just compensation."

The section then goes on to prescribe the manner in which damage to same may be ascertained and compensation awarded. The section is self executing in its provisions, therefore the Legislature has provided no means in conflict therewith nor has it the authority to do so. Under this provision of the Constitution the right of the state or a municipality thereof to appropriate public property to a public use can not be exercised until reasonable compensation for damage to the fee is awarded. But the contention that compensation for damage to the fee should have been awarded upon the selection of the point of crossing and the estimate of cost of building such crossing at such point is wholly without merit.

As we view the matter, it is immaterial whether the estimate of damage to the fee or the estimate of cost of constructing the crossing should be made first, in other words, it is immaterial so far as the law is concerned as to which estimate is made first, but it stands to reason that neither estimate could be made until the point for the crossing be first selected; after such point for the crossing is selected, the fact that the Corporation Commission made the estimate of the cost of construction of the crossing before the award was made as to the damage to the fee, does not effect the jurisdiction of the Corporation Commission nor the validity of the estimate it made. The fact is that the proper authorities for the City selected the point of crossing and the Corporation Commission upon the evidence submitted, made an estimate of the cost of construction thereof and assessed the cost of same to the parties interested, viz: the City of McAlester and the Railroad company. The statutes, however, prohibit the Corporation Commission from assessing more than 50 per cent of the cost of construction to the City, and as it assessed only 50 per cent of such cost to the city its order should be and is sustained.

We hold, however, that in this case, it appearing that the Railroad [fols. 184 & 185] Company owns the fee in the right of way and that its charter contains no provision that it shall part with such fee without compensation, the order of the Corporation Commission for the Railroad Company to construct such under grade crossing cannot be enforced until after an amicable settlement between the City of McAlester and the Railroad Company, or until after an award for damages to the fee is determined by proper condemnation proceedings instituted by the City in the courts as provided by statute, and that when such is done and the damages to the fee determined by the court, then the order of the Corporation Commission for the construction of such crossing may be enforced as the law provides.

Johnson, C. J., Kennamer, Branson and Cochran, JJ. concur.

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[fol. 185-1] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed Dec. 20, 1923

Comes now the appellant and for its application and petition for a rehearing herein respectfully shows to the court that in the opinion of this court filed in this cause on December 11, 1923, questions decisive of this case and duly submitted by counsel for appellant have been overlooked by the court, and the decision is in conflict with controlling decisions, to which the attention of this court was called both in brief and in oral argument, and which have been overlooked by this court, as hereinafter more particularly set out.

[fol. 185-2] This court states in its opinion that appellant complains of the Corporation Commission's order on two material grounds:

First. Lack of jurisdiction.

Second. Lack of sufficient facts to warrant the exercise of jurisdiction, if by law it had jurisdiction."

The court has completely overlooked an additional material ground of complaint covered in appellant's brief under sub-head No. 2, pages 66 to 86, which sub-head is as follows:

## "II

"Validity and effect of contract ordinance No. 74 and constitutional questions involved. (Specifications of Error 3, 4, 5 and 6.)"

The Corporation Commission, by its order herein, which this court has affirmed by its opinion herein, directs the appellant to construct an undergrade highway crossing at the point in question, and to undertake to agree with the appellee on a division of the cost of such crossing.

One of the most important reasons alleged by appellant why the Corporation Commission could not legally require it to share the burden of the expense of such crossing was the existence of a contract between appellant and appellee covered by Ordinance No. 74, passed and approved November 8, 1901, by the terms of section 9 of which the appellee agreed that if a highway crossing should ever be established at the point in question, it should be undergrade and should [fol. 185-3] be at the sole cost and expense of the appellee. This ordinance was introduced in evidence at the hearing before the Corporation Commission and is printed in its entirety at pages 18 to 25, of appellant's brief in this court, section 9 thereof covering the matter now before the court, being on page 24 of that brief.

The Corporation Commission by its order herein, which is affirmed in its entirety by this court, mentions the fact that this ordinance was introduced and quotes from a part of it, but not from section 9, but from section 5, which quoted part of section 5, does not apply to the controversy now before this court, and the Commission then said in its order that under the 1919 law, it was given full jurisdiction over highway crossings, and attempted to dispose of appellant's contention by that brief reference.

In appellant's specifications of error, at pages 33 and 34 of its brief herein, the questions arising out of this contract between the parties are presented as follows:

"3. The Corporation Commission of Oklahoma had no jurisdiction to impose upon appellant any requirements or conditions other than, or different from, those agreed to in contract Ordinance No. 74 of the City of McAlester, passed and approved on November 8, 1901.

"4. The Corporation Commission of Oklahoma erred in ignoring and treating as null and void and of no effect, the said contract between the City of McAlester and appellant as represented by said Ordinance No. 74.

[fol. 185-4] "5. The order of the Corporation Commission results in a taking of appellant's property without due process of law and without compensation and denies it the equal protection of the law in violation of the fifth and fourteenth (5th and 14th) amendments to the Constitution of the United States, and of sections seven and twenty-four, article two, of the Constitution of the State of Oklahoma.

"6. The order of the Corporation Commission denies to appellant the right of contract and impairs the obligation of contracts in violation of section ten of article one of the Constitution of the State of Oklahoma."

This question is presented as fully as counsel were able to brief it under the sub-head No. 2, at pages 66 to 86, of its brief, and section 9 of the contract Ordinance No. 74, is again quoted at page 68 of that brief, the provision thereof under which the city agreed to bear the entire cost of any future crossings at the point in question being as follows:

"\* \* \* and both of said crossings at Comanche Avenue and Washington Avenue, shall be constructed upon plans and specifications to be approved by the said railway company and at the sole cost and expense of the said City of South McAlester."

As shown in appellant's brief at pages 66 to 86, this contract Ordinance No. 74 had been in effect for a great many years and had been conscientiously lived up to in all particulars by both parties until the institution of this proceeding, and at the time it was made the city [fol. 185-5] had authority under the laws of Arkansas, then in force in Indian Territory, to make such a contract. These laws are set out in full at pages 69 to 71 of appellant's brief. The following citations were also given as authority for the validity of the contract ordinance:

28 Cyc. 634-6;

Dillon's Municipal Corporations, 4th ed., Vol. 1, page 512;

Elliott on Contracts, Vol. 1, Sec. 601.

Appellant then cited and quoted at pages 72 to 86 of its brief from a great many cases upholding contracts more or less similar in their nature, all of which have been overlooked by this court and a list of which appellant begs leave to submit as follows:

City of Argentine v. Atchison, T. & S. F. Ry. Co. (Kans. 1895), 41 Pac. 946;

Hicks v. Chesapeake & O. R. R. Co. (Ct. of A. Va. 1903), 45 S. E. 888;

State, ex rel. City of Carthage v. Cowgill & Hill Mill Company, 55 S. W. 1008;

Elliott on Contracts, Vol. 1, Sec. 615;

First National Bank of Red Oak v. City of Emmetsburg (Ia. 1912), 138 N. W. 451;

Atlas Life Insurance Co. v. Board of Education of the City of Tulsa (not officially reported), 200 Pac. 171;

Hitchcock, et al., v. City of Galveston, 96 U. S. 341, 24 Law ed. 659;  
 Washington Water Power Co. v. City of Spokane (Wash. 1916), 154 Pac. 329;  
 Crump v. Guyer, et al., 60 Okl. 222, 157 Pac. 321;  
 [fol. 185-6] Enid City Railway Company v. City of Enid, 43 Okl. 778, 144 Pac. 617;  
 Elliott on Contracts, Vol. 3, Secs. 2725, 2729 and 2763.

If this contract Ordinance No. 74 is a valid and binding contract, and appellant contends that it is, then any highway crossing established at the point in question must be constructed at the sole cost and expense of the city, and the action of the Corporation Commission as affirmed by this court, in requiring appellant to participate in the cost of construction of such highway crossing, is in violation of the plain terms and provisions of the contract and in violation of the contract rights and other constitutional rights of appellant under both the state and Federal Constitutions, as set out in its specifications of error above quoted, and appellants would be entitled to have any adverse decision of this court reviewed by the Supreme Court of the United States.

The evidence of Mr. Z. G. Hopkins (Rec., pp. 92-112, brief pp. 27-28), shows that the total cost of an underhead crossing such as is contemplated by the Corporation Commission's Order, would be from \$18,000.00 to \$28,000.00, from which it will be seen that to require appellant to share in that cost to the extent of fifty per cent, or more, when its contract with the appellee relieves it from any part of such cost, is a very substantial pecuniary damage to appellant's rights and interests.

[fols. 185-7] In appellant's reply brief there is a further discussion of the validity of this contract Ordinance No. 74, under sub-head 2, at pages 12 to 21 thereof, with the following citations of authority:

Elliott on Contracts, Vol. 1, Secs. 603 and 615;  
 Elliott on Contracts, Vol. 2, Secs. 1514, 1515 and 1519;  
 Western Union Tel. Co. v. Pennsylvania Co. (C. C. A. 3rd Cir.), 129 Fed. 849;  
 Great Northern Ry. Co. v. Manchester, etc., Ry. Co., 5 De Gex & Samale's Chancery Reports, 138.

It is respectfully requested that the court will carefully read these portions of appellant's first brief and reply brief and review the authorities therein cited in support of the validity of this contract Ordinance No. 74, and decide the question raised thereunder.

There are other matters of lesser importance in this court's opinion which seem to appellant to be contrary to law and to which attention is respectfully called as follows:

This court, in discussing the 1919 law, giving jurisdiction to the Corporation Commission in these highway crossing matters, very properly, as counsel thinks, holds that the point of crossing must be selected before there can be either an estimate of cost of construction or a condemnation to acquire the right to cross, but this court then says:

[fol. 185-8] "The fact is, that the proper authorities for the city selected the point of crossing and the Corporation Commission, upon the evidence submitted, made an estimate of the cost of construction thereof and assessed the cost of same to the parties interested \* \* \*"

In so deciding that the appellee city was the party to select the point of crossing, this court does violence to section 4 of the 1919 act. This court, in its opinion, reviews and construes sections 1, 2 and 3, of that act, but overlooks entirely section 4, which is section 3494 of the 1921 Compiled Laws, and which gives the Corporation Commission the exclusive jurisdiction to fix the point of crossing, or, in other words, the location of the highway crossing over the railroad. This section in full reads as follows:

"The Corporation Commission shall have exclusive jurisdiction to determine and prescribe the particular location of highway crossings, for steam or electric railways, the protection required, to order the removal of all obstructions as to view of such crossings, to alter or abolish any such crossings, and to require, where practicable, a separation of grade at any such crossing, heretofore or hereafter established."

This court's opinion is, therefore, in conflict with the statute and for the purpose of this case and future cases, it is respectfully urged that the statute in its entirety, covered by sections 3491 to 3495, both [fol. 185-9] inclusive, 1921 Compiled Laws, should be fully and properly construed in accordance with its plain language and intent. On reflection, it is apparent that if the power to locate the crossing is in some instances to be given to the local authorities rather than to the Corporation Commission, as contemplated by this statute, then, to a very large and material extent, the Corporation Commission loses the power sought to be given it by the statute for the safety and protection of travellers on highways and on railroads by requiring crossings to be constructed at comparatively safe places and in a safe manner.

It would seem to counsel that, as stated in their brief at pages 62 to 65, and the authorities there cited, that the procedure of this 1919 law should be practically the same as that outlined by this court, for the crossing by one railroad of another under authority of the Corporation Commission and under sections 18 and 27, article 9, of the Oklahoma Constitution. This court has held in *Achison T. & S. F. R. Co. v. Corporation Commission*, 22 Okl. 106, 98 Pac. 330, and *Missouri K. & T. R. Co. v. Richardson*, Judge, 25 Okl. 640, 106 Pac. 1108, that the Corporation Commission must first determine the necessity for, the place where and the manner in which one railroad may cross another, after which the right to cross may be acquired by condemnation proceedings.

This 1919 law undertakes to give the Corporation Commission jurisdiction to determine the necessity for, the place where and the [fols. 185-10 & 186] manner in which a highway shall cross a rail-

road and to say that the local authorities may determine the necessity for and fix the place of such crossing is contrary to this statute.

Wherefore, for the reasons hereinabove set out, appellant respectfully prays the court for a re-hearing herein and that on re-hearing, the contract Ordinance No. 74, be upheld in its entirety, and that the 1919 law be fully and correctly construed, and that the cause be reversed.

Respectfully submitted, M. D. Green, H. L. Smith, Attorneys  
for Appellant.

Dated December 19, 1923.

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[fol. 186-1] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

RESPONSE TO APPELLANT'S PETITION FOR REHEARING—Filed July  
23, 1924

Come now the appellees herein and file response to the application and petition of the appellant for a rehearing herein, the court having requested that such response be filed.

The appellant in its petition for rehearing seems to complain upon two grounds, as follows, taking up the last ground first:

The appellant complains (pp. 8-10) that the decision of the court herein holds that "the appellee city was the party to select the point of crossing."

It is perfectly apparent that the court has not so decided. On the contrary, the court expressly construes the Act of 1919 (Ch. 53, p. 88, Sess. L. 1919; Comp. Stat. Okl. Secs. 3491-3497), to confer [fol. 186-2] exclusive jurisdiction upon the Corporation Commission, both in the selection of the crossing and in all matters relating to the construction of the crossing, the court expressly saying that the language of the Act "could not mean anything else than that no other administrative board or body has jurisdiction over such matters." The opinion further proceeds to say:

"To acquire jurisdiction in such matters the Corporation Commission is of course confined to its ordinary rules and common reason. If it be an individual's rights affected, perhaps the petition of the individual would be sufficient; if it be a municipality, jurisdiction could be acquired by the ordinary rules as to administrative boards authorized to represent municipalities in such matters. In the case at bar it is the city council through its city attorney."

That is to say, that while the Corporation Commission has the exclusive jurisdiction over such matters, this jurisdiction is called into exercise only in the ordinary way in which such jurisdiction is invoked; that is, upon the application or petition of the interested



party. In the instant case, the city council of McAlester having decided that there should be better means of public communication and travel through different parts of the city by an undergrade crossing over the right of way of the Missouri, Kansas & Texas Railway Company at Comanche Avenue, selected, by proper resolution of the city council, such point as a railway crossing and instructed its city manager and city attorney to present its application to the [fol. 186-3] Corporation Commission for an order requiring the railway company to construct such crossing at Comanche Avenue. The record shows that such application was presented and that testimony was introduced upon the issue as to whether a public necessity existed for a railway crossing at Comanche Avenue, and the record further shows that the Corporation Commission, upon consideration of the evidence, found there was such a public necessity, and that it selected Comanche Avenue as a proper place for a railway crossing, having jurisdiction, and the sole jurisdiction, to make such selection and to order the constructing of the crossing. The fact that it had the exclusive jurisdiction to order the construction of the crossing at that particular point itself necessarily involves the power to select the place of crossing, and besides, the Act (Sec. 4) specifically says that, "The Corporation Commission shall have exclusive jurisdiction to determine and prescribe the particular location of highway crossings." The city, of course, in the first instance, petitions for the crossing at the particular point where the same is desired, but the Commission alone determines or selects the location of the crossing, and it is perfectly manifest that in this sense alone was the language used by the court and complained of by appellant, "that the proper authorities of the city selected the point of crossing," and we almost feel like apologizing to the court for dwelling at such length upon a proposition so obvious from the court's decision.

[fol. 186-4]

## II

Appellant further complains (p. 2) that the court has overlooked its contention with reference to the validity and effect of Section 9 of Ordinance No. 74 of the City of South McAlester, passed November 8, 1901.

In answer to this contention of appellant, it would be sufficient to say that the validity and effect of this ordinance was fully discussed and argued in the briefs filed by the parties (see Original Brief of Appellant, pp. 66-86; Brief of Appellees, pp. 41-86, and Reply Brief of the Appellant, pp. 12-21), the discussion of this point occupying a very prominent and conspicuous place in the briefs, with copious quotations from many authorities upon the question. It could scarcely be said, therefore, that the point has escaped the attention and consideration of the court. The effect of the decision necessarily overrules the contention of the appellant, for if section 9 of Ordinance No. 74 is a valid and subsisting contract between the railway company and the city of McAlester, then it is conclusive

road and to say that the local authorities may determine the necessity for and fix the place of such crossing is contrary to this statute.

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against the right of the city to extend Comanche Avenue across appellant's right of way by condemnation proceedings, except on the terms stipulated and conclusive against the power and jurisdiction of the Corporation Commission to assess any portion of the cost of the crossing against the appellant, both of which are conclusively settled by the decision. It is not necessary that the court in its decision should take up and discuss in detail each proposition argued in the briefs and the court is under no obligation to do so.

[fol. 186-5] That this question received the deliberate consideration of the court is clearly evident not only from the necessary effect of the decision, but from its express language. The court bases the jurisdiction and power of the Corporation Commission to order the construction of the crossing specifically upon the police power of the state. In support of this it cites, among others, the case of *Chicago, Rock Island & Pacific Railway Co. v. Taylor*, 79 Okl. 142, 192 Pac. 349, which case the appellees in their brief (pp. 72-77) in their argument answering the contention of the appellant as to the controlling effect of the city ordinance, cited, after quoting from a great number of other authorities, as a controlling decision and as foreclosing the question in this court. The opinion in the instant case, after citing the *Taylor* case in support of its conclusion, says that its decision is "supported as to comparatively every phase involved" in an exhaustive opinion by Mr. Justice Holmes in *Erie Railroad Co. v. Board of Public Utility Commissioners*, 254 U. S. 394, 65 L. Ed. 322, and follows with a quotation from the latter case which decisively answers every contention made by appellant as to the validity and effect of the old city ordinance, and adds:

"This case, like the case of *C. R. I. & P. v. Taylor*, supra, clearly shows the regulation of street railway crossings and maintenance in such form as to be safe to the public is the proper exercise of the police power of the state \* \* \*."

From the case of *C. R. I. & P. v. Taylor*, the appellees quoted in their brief (p. 75):

[fol. 186-6] "\* \* \* It is firmly settled by the courts in a long line of decisions that the Legislature in the exercise of its police power may operate railroad companies with the duty of maintaining crossings, although the street or highway was laid out subsequent to the construction of the railroad (citing a vast number of cases). \* \* \* In the exercise of its police powers, the state may require railroad corporations at their own expense, not only to abolish grade crossings, but to build and maintain suitable bridges and viaducts to carry the street or highway across the railroad tracks (citing many cases)."

In the case of *Erie Railroad Co. v. Board of Public Utility Commissioners*, supra, the Erie Railroad had been ordered by the Board of Public Utility Commissioners of New Jersey by an order dated April 20, 1915, to construct or make changes in fifteen places in the city of Paterson, where the railroad crossed that number of streets. The Board of Public Utility Commissioners of New Jersey derived

their authority to order the crossings under an Act of March 12, 1913. The case seems to have been one of great importance, involving an expenditure by the railroad company of over \$2,000,000. There was an imposing array of counsel, including Mr. Charles E. Hughes, in the case, and the briefs show the utmost diligence and power in keeping with the skill and experience of the distinguished corps of counsel. Among other things, it was contended that as the crossings involved an expenditure of over \$2,000,000, and that the company had not more than \$100,000 available, "that the order of the board and the statute when construed to justify it, not only in- [fol. 186-7] terfered unwarrantably with interstate commerce and impaired the obligation of contracts but took the Erie Company's property without due process of law." In other words, that the order and statute were confiscatory, a destructive interference with interstate commerce and impaired the obligation of the Erie Company's contract (arising presumably from its charter and franchise).

These arguments, of course, possessed both the logic of reason and the persuasion of expediency, and presented a most powerful appeal. They were presented by great counsel and to the greatest court on earth, but above them all, the court heard only the more powerful and all-controlling voice of the police power of the state so forcibly demonstrated in the quotation above by this court in its opinion; that voice which is thus defined in *Yazoo & M. V. R. Co. v. Harrington*, 37 So. 1016, 1018, 85 Miss. 363, 3 Ann. Cas. 181:

" 'Police power' includes the public convenience, as well as the public safety, health, and morals. That power is to organized government what the atmosphere is to man; 'its vital breath, its native air.' It penetrates, permeates, pervades all, in its omnifically healing reach, 'broad and general as the casing air.' It is the oil in which the machinery of government efficiently moves."

We call attention to the following additional language of the United States Supreme Court in the Erie Railroad case *supra*:

"Most of the streets concerned were laid out later than the rail- [fol. 186-8] roads, and this fact is relied upon, so far as it goes, as an additional reason for denying the power of the state to throw the burden of this improvement upon the railroad. That is the fundamental question in the case. It might seem to be answered by the summary of the decisions given in *Chicago, M. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 438, 58 L. Ed. 671, 674, 34 Sup. Ct. Rep. 400: 'It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways.' *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. Ed. 157, 35 Sup. Ct. Rep. 82; *Northern P. R. Co. v. Puget Sound & W. H. R. Co.*, 250 U. S. 332, 63 L. Ed. 1013, 39 Sup. Ct. Rep. 474. For although the statement is said to be explained as a matter of state law by the previous decisions in *Minnesota*, it is made without reference to those decisions or to any local rule; and, more-

over, the intimation of the judgment in the present case is that, whatever may have been the earlier rulings, the law of New Jersey now adopts the same view.

"But it is argued that the order is unreasonable in the circumstances to which we have adverted, the principle applied to the regulation of public service corporations being invoked. *Mississippi R. Commission v. Mobile & O. R. Co.*, 244 U. S. 388, 391, 61 L. Ed. 1216, 1219, 37 Sup. Ct. Rep. 602; *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220, 59 L. Ed. 926, P. U. R. 1915 C, 309, 35 Sup. Ct. Rep. 560. But the extent of the states' power varies in different cases from absolute to qualified, somewhat as the privilege in respect of inflicting pecuniary damage varies. The power of the state over grade crossings derives little light from cases on the power to regulate trains."

[fol. 186-9] The language quoted by this court from the *Erie Railroad* case is so forceful and apt to the controversy of the appellant as to the alleged ordinance contract, that there is an impulse to requote it by way of emphasis; and particularly in the following language:

"To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right."

Since the order of the Commission in the instant case is conceded, under all the authorities (see also additional authorities cited in Brief of Appellees, p. 53), an exercise of the police power of the state, and a proper and justifiable exercise of such power, then it conclusively follows that the alleged contract claimed under section 9 of Ordinance No. 74 of the City of South McAlester, passed November 8, 1901, can not be interposed as an obstruction to the exercise of that power, for there can be no proposition more definitely, clearly and unalterably settled as to the powers of municipalities, and no wall of limitation more permanently and impassably drawn around the exercise of municipal contractual powers than this, that the police power of the state held and reserved for the public in general as well as the public in each particular municipal locality, can not by contract, or otherwise, be surrendered, bartered away, limited or abridged by one jot or tittle, either by contract or otherwise. In indestructibility, in perpetuity of existence, in all things, it is co-[fol. 186-10] extensive with the Constitution itself and can not be surrendered by the people themselves. Many authorities laying down these doctrines have been cited in the brief of the appellees and further argument or citation of authorities would be just cause for criticism as useless imposition upon the court.

But after all, what is this vaunted much-talked-of "contract," of which the appellant makes so much and on account of which it complains so grievously that its constitutional rights are being impaired? Is it a contract; or is it a mere nudum pactum? What consideration

has ever been paid for it? Was it appellant's contribution toward the construction of the underpass at Cherokee Avenue or of the viaduct at Grand Avenue? If this be contended, then the City of South McAlester, Indian Territory, had the right of eminent domain which it could have exercised at that time. If so, the City of South McAlester, Oklahoma, had the right upon the advent of statehood to have exercised the right of eminent domain and to have placed the entire cost of these improvements upon the appellant, where as now it is within the discretion of the Commission to apportion only a part of the cost, not less than one-half, upon the appellant; and besides this, this section dealing with the viaduct at Grand Avenue makes the viaduct the property of the city and undertakes to cast upon it the exclusive cost of subsequent maintenance, thereby to relieve the appellant of its statutory duty in that behalf. Was it the trivial cost of installing the few planks at the grade crossing at Delaware, Monroe and Miami Avenues? Is it because of some claim that Co-[fol. 186-11] manche Avenue is included in a general scheme that all other crossings over the appellant's line in the City of McAlester and the city's future rights to condemn such crossings are perpetually closed and shut up, except upon such terms as the appellant may prescribe? If so, out of its own mouth it is condemned under all the authorities as utterly beyond the power of the town council as a vain attempt to sell its birthright for a mess of pottage.

Some provisions of Ordinance No. 74 have been fully executed between the parties and as to these, of course, no question exists. Even as to those which have been executed, all the conditions were not strictly performed as claimed by appellant, as, for instance, Delaware Avenue was not vacated and closed upon the construction of the undergrade crossing at Cherokee Avenue, notwithstanding Section 7 provides that it shall be.

But Section 9, which is the one in controversy, is severable and certainly has no supporting consideration in the agreement elsewhere found in the ordinance to keep forever closed and vacated all other streets and avenues across appellant's right of way except the limited few mentioned. Such a claim would be fatal to its validity as fully shown by the authorities cited in the brief of Appellees (pp. —).

Section 9, then, stands apart from the other provisions and we search in vain for any consideration whatever to support it. The appellant claims that Comanche Avenue has never been opened across its right of way. This claim is true, and the Court correctly so de-[fol. 186-12] cides, and further finds and decides that the crossing ordered by the Corporation Commission can not be constructed until, by proper condemnation proceedings, Comanche Avenue has been opened across appellant's right of way. But according to appellant's contention, the payment of all the cost of the crossing, the Act of 1919 and the previous statute to the contrary notwithstanding is an indispensable condition to such condemnation proceeding. So we come back at the last, in travelling this circle, to the generic essence of Section 9, which is that it undertakes to barter away, to limit and abridge the city's right of eminent domain, and the police power of the state with reference to the public highways, which we all know



can not be done. Nothing else can be made of it. That is the spirit and essence and manifest object and purpose of it, and it is perpetual. No limitation is set to its duration in point of time, nor in changes of condition.

But if it were not void on account of its subject matter and because not supported by any legal or valuable consideration, it is so indefinite and leaves the things to be performed by the city so exclusively to the arbitrary option and execution of the railway company as to render it void and unenforceable on that account. For instance, the appellant contends that the city has not the right to open the crossing upon being willing to pay all the costs, but that the appellant has the right in the first instance to resist the opening of Comanche Avenue, thus implying that the city must first resort to the courts to enforce its right to have the crossing. This certainly does not [fol. 186-13] bestow upon the city the certain and definite right of having the crossing even upon payment of the cost. Therefore, no certain right to the city arises to anything except the privilege to first wage its battle in court to obtain the crossing. Then again, there is no certainty as to how the expense to the city may be regulated, but this is left to the arbitrary terms which the railway company may impose, for it is provided that the crossing "shall be constructed upon plans and specifications to be approved by the said railway company," and there is no limit as to the nature and extent of those plans and specifications. Under it the railway company may prescribe all manner of requirements which in the judgment of the city or of disinterested judges might not be necessary. This is not mere conjecture, but is actually shown in the testimony of Mr. Z. G. Hopkins testifying for the railway company (Record, pp. 92-97, Brief of Appellant, pp. 27-28), who says that the opening of such crossing will require the raising of the tracks of the railway company, which the testimony shows to be laid upon a high dump passing north and south through the city, and, of course, the plans and specifications prescribed by the railway company would require the elevation of the railway tracks along this dump, involving in this alone an item of expense which no reasonable person could have guessed would be ever involved in the construction of the crossing, and which would be necessarily great as the witness says there is a very difficult grade at that point. The city's view as to this point is that if the tracks [fol. 186-14] are not sufficiently high to permit the underpass crossing (which, however, is not shown to be a fact), the same could be overcome by a slight depression in the surface of the underpass. But Section 9 leaves the plans and specifications to the sole approval of the railway company. Section 9 further provides that the city shall bear the cost of all "grade crossings over any side tracks of the said railway company that now exists, or that may hereafter be established upon the grade of said Comanche Avenue," shall be borne by the city and, of course, upon plans and specifications to be approved by the railway company. Mr. Hopkins says that it would be probably necessary to lower certain of their industry tracks and raise the main line tracks and the estimate of total expense would be in excess of \$28,000. Items as to paving and curb were also suggested. These

changing conditions and those which may ensue in the subsequent growth and development of the city and the varying requirements of the railway engineers since all is left by the plain terms of Section 9 to their discretion and approval, render it so uncertain as to what the cost might be, besides leaving it to the arbitrary discretion and requirement of the railway company, which might place the cost to such points as to be beyond the willingness or ability of the city to perform, or to be prohibitive, render the alleged contract unenforceable, even if it were a contract existing between ordinary persons dealing with some ordinary business project. This proposition rests upon principles so plain and well known that we deem the citation of authorities unnecessary.

[fol. 186-15] The alleged contract being beyond the power of the city council of South McAlester, Indian Territory, to make, neither it nor its successor, the City of McAlester, Oklahoma, is bound by it, nor can there be any estoppel against asserting its illegality.

In *Newport v. Railway Co.*, 58 Ark. 270, the town of Newport had made a contract with the Batesville & Brinkley Railway Co. to construct a levee on two sides of the town to protect it from overflow, and to pay the company therefor in warrants of the town \$10,000, and the railway company was to have the privilege of using the levee as a road bed for its railway. One line of the levee was completed, accepted and paid for by the town, after which it refused to accept and pay for the other line of the levee, and the company having completed the levee according to the contract, brought the suit to recover a balance of \$4,480.00 alleged to be due on the contract. The answer of the town admitted its attempt to execute the contract, but says the contract was made for the purpose of inducing the railway company to locate and construct its railway through the town and to establish a station there, and denies the power of the town to make the contract. In holding that the contract was ultra vires and that the railway company could not recover, the court, among other things, said:

“Had the incorporated town of Newport the power to make the contract which was the foundation of this suit?”

“In 1 Dillon, Mun. Corp. Sec. 89, it is said: ‘It is a general and undisputed proposition of law that a municipal corporation possesses [fol. 186-16] and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.’”

\* \* \* \* \*

“In *Minturn v. Larue*, 23 Howard, 435, the court said: ‘It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and

rights can be exercised under them as are clearly comprehended within the records of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.'

\* \* \* \* \*

"Was the contract such as could be ratified by accepting the benefit of work done under it, or is the town estopped by permitting the work to be done under it and accepting the benefit of such work?"

"In *Schumm v. Seymour*, 24 N. J. Eq. 144, it is said: 'It is a general and fundamental principle of law, that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation, or its officers, to make the contract. And a contract beyond the scope of the corporate powers is void.' 'The doctrine of equitable estoppel has no place in a case where usurped powers have been exercised by municipal officers, who, in so doing, were contravening public policy, as well as known positive law.'"

\* \* \* \* \*

[fol. 186-17] "Judge Dillon, in Sec. 463, 1 *Dillon on Municipal Corporations*, states the law in this behalf plainly and tersely, thus: 'A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, which are within the scope of the corporate powers, but not otherwise. \* \* \* But a subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld; and where the officers of such a body fail to pursue the requirements of a statutory enactment under which they are acting the corporation is not bound. In such cases the statute must be strictly followed; and a person who deals with a municipal body is obliged to see that its charter has been fully complied with; when this is not done, no subsequent act of the corporation can make an ultra vires contract effective.'

"As the contract sued in in this case was without the scope of the corporate powers of the incorporated town of Newport, it could not be ratified, and the town was not estopped to deny its invalidity by having accepted and received the benefit of work done under it, with the knowledge and consent of the town."

This Arkansas case construing municipal contracts was decided under the provisions of *Mansfield's Digest* which governed in the City of South McAlester at the time of the passage of the ordinance. The same rigorous rule of construction prevails throughout the Oklahoma cases.

*O'Neil Engineering Co. v. Incorporated Town of Ryan, et al.*,  
32 Okl. 738, 124 Pac. 19.

City of Enid, et al. v. Warner-Quinlan Asphalt Co., 62 Okl. 139, 161 Pac. 1092.

[fol. 186-18] Michael v. City of Atoka, 76 Okl. 266, 185 Pac. 96.

Hyde v. City of Altus, 92 Okl. 170, 218 Pac. 1081.

The appellant in its petition for rehearing insists that the court read the authorities listed by it. We examined these cases and discussed some of them in our brief herein (pp. 82-85). We have again read these cases, but it would require too much space to analyze all of them. Upon examination they will be found to be cases of executed contracts, and in addition, all of them, with possibly one exception, involve business contracts, and not the police power of the state or the power to condemn for public highways.

Take the case of Atlas Life Ins. Co. v. Board of Education, 200 Pac. 171, and this related to a lease for 99 years, executed by the Board of Education of the City of Tulsa, and is manifestly without application.

Take the Oklahoma case of Crump v. Guyer, 60 Okl. 222, 157 Pac. 321, and the question there was upon an attorney's lien claim for a fee.

Take the case of State ex rel. v. City of Carthage, 55 (57) S. W. 1008, where the city granted a mill race across certain streets upon condition that the same should not interfere with the ordinary use of the street. Across the street, there being already a natural ditch or stream across the street, the grantee constructed a bridge which was washed away, and a dispute arising as to whether it was the duty of the grantee to rebuild the bridge, a contract was executed [fol. 186-19] by which the grantee paid a certain sum of money in consideration that the city would rebuild and thereafter maintain the bridge, which was done. This, of course, was not only an executed but a business contract, and not pertinent.

In Hitchcock v. City of Galveston, 96 U. S. 341, 24 L. Ed. 659, the City Council having power to do so, entered into a contract with another to construct certain sidewalks which were constructed, and the city's obligation to pay for the same was upheld. This was both an executed and a business contract.

The case of Enid City Railway Co. v. City of Enid, 43 Okl. 778, 144 Pac. 617, also an Oklahoma case, which we noticed in our former brief (pp. 83-4) there was a contract whereby to induce the street railway company to construct its lines, a clause was inserted that it should only be required to pave 61½ inches on the outside of its tracks, and this was held to be valid notwithstanding a subsequent general statute requiring street railways to pave a larger space, but this was also an executed contract, and in addition it was specifically pointed out in the case of Chicago, Rock Island & Pacific Railway Co. v. Taylor, 79 Okl. 142, 192 Pac. 349, where the Enid city case was relied upon, that the case did not involve the exercise of the police power of the state.

An examination of the other cases cited by appellant will reveal the same inapplicability. Appellant has also by typewritten supplement to its brief called attention to the case of Louisiana Public

*Service Commission v. Morgan's Louisiana & Texas Railroad & [fol. 186-20] Steamship Co.*, — U. S. —, 68 L. Ed. 423 (Advance Sheet, May 1, 1921). The facts in that case were that the City of New Orleans had purchased by definite contract a franchise over the railroad company's right of way for the use of a street railway upon express condition that the grantee (the city) should pay both for the erection and subsequent maintenance of the viaduct over the railway company's property, all of which was done, and afterward, the viaduct having fallen into disrepair and neither the city nor street railway company restoring the same, the Louisiana Public Service Commission ordered the railroad company to do so, it was held, in the first place, that it was not apparent that the Louisiana statute had been given jurisdiction to make the order over the railroad company as to the City of New Orleans, and that it would take very clear and definite language in the statute to such effect before the court would hold that the state had undertaken to authorize the Public Service Commission to order the railroad company to repair the viaduct in the face of the express and executed contract on the part of the city to construct and repair the viaduct. There is no parallel here with the instant case, and besides, the intimation is that if the statute had expressly bestowed jurisdiction on the Public Service Commission to order such changes in the City of New Orleans, that it would have power to do so notwithstanding the contract and the prior performance under it by the City of New Orleans.

It is clear, therefore, in our opinion that none of the cases cited by appellant uphold its position or vindicate the proposition that [fol. 186-21] any contract which abrogates or surrenders the police power in such regard is of any force or validity.

In closing this response to appellant's petition for a rehearing, and in further support of the decision in this case, we call attention to the further case of *Galveston Wharf Co. v. City of Galveston*, 260 U. S. 473, 67 L. Ed. 355, where the city by contract with a wharf owner had become part owner of the wharf, which ownership it was provided in the contract was to be inalienable, except by a four-fifths vote of the qualified voters of the city, and the city having amended its charter so as to authorize it to acquire the joint property by condemnation upon a majority vote, and being about to do so, the wharf company undertook to enjoin the same upon the ground that it would impair the obligation of its contract and deprive the plaintiff of its property without due process of law, contrary to the Constitution of the United States; further alleging that it had made large expenditures to improve the property at its own cost, and the Supreme Court said:

"Without going into greater detail we will assume that the alleged contract was made and bound the city, and that its terms will be departed from if the city should exercise the new power. The bill alleges that the proper officers will declare the amendments adopted, and that, unless restrained, the city 'will attempt to partition said property or condemn the same, or both,' and prays for

an injunction against attempting to enforce the amendments in any manner so far as the above-mentioned property is concerned. [fol. 186-22] The case was heard upon the pleadings and documentary evidence, but it is unnecessary to state them further since the decree went upon the ground that the bill did not state a case within the jurisdiction of the court.

"We are of opinion that the decree was right. If the bill can be taken to allege sufficiently any threat and intent of the defendant, it does not show that the city will go beyond an exercise of the right of eminent domain. The allegation is, 'will attempt to partition or condemn.' If questions can be raised about the constitutionality of the ordinance authorizing partition, the city may confine itself to condemnation, and will, so far as appears. But there is nothing to prevent the exercise of eminent domain by the legislative power. *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718; *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 62 L. Ed. 124, 38 Sup. Ct. Rep. 35. These cases not only dispose of the objection based upon the contract, but also show the difference between an attempt to transfer property from one private person to another, and the taking it for public administration by a public body. 166 U. S. 694. There is no question about the principle, and therefore there is no substantial Federal question raised by the bill. This seems to us so plain that we have not thought it necessary to consider whether the suit was prematurely brought."

One more case and we will desist. In *State of Georgia v. City of Chattanooga*. — U. S. —, 68 L. Ed. 399 (Advance Sheet, May 1, 1924, decided April 7, 1924), the state of Georgia having entered a railroad into and through a portion of Tennessee and into the City of Chattanooga, and having acquired lands there for a railway station and terminal facilities, and the City of Chattanooga [fol. 186-23] having subsequently grown and expanded so as to require the opening of a street through the railway station grounds, the city undertook by condemnation proceedings to condemn the necessary right of way for the street, and the State of Georgia obtained leave to file its bill of complaint in the Supreme Court of the United States to enjoin the same on the ground, among others, of the impairment of its contract. In dismissing the bill of the State of Georgia upon the motion of the city, the Supreme Court said:

"The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister state owns the land for railroad purposes. Having acquired land in another state for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation. The terms on which Tennessee gave Georgia permission to acquire and use the land, and Georgia's acceptance,

amount to consent that Georgia may be made a party to condemnation proceedings.

"The power of eminent domain is an attribute of sovereignty, and inheres in every independent state. *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206, 207; *United States v. Jones*, 109 U. S. 513, 518, 27 L. Ed. 1015, 1017, 3 Sup. Ct. Rep. 546; *Shoemaker v. United States*, 117 U. S. 282, 300, 37 L. Ed. 170, 185, 13 Sup. Ct. Rep. 327; *Cincinnati v. Louisville & N. R. Co.*, 22 U. S. 390, 404, 56 L. Ed. 481, 485, 32 Sup. Ct. Rep. 267. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered, and, if attempted to be [fol. 186-24] contracted away, it may be resumed at will. *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 62 L. Ed. 124, 38 Sup. Ct. Rep. 35; *Galveston Wharf Co. v. Galveston*, 260 U. S. 473, 67 L. Ed. 355, 43 Sup. Ct. Rep. 168. It is superior to property rights (*Kohl v. United States*, 91 U. S. 367, 371, 23 L. Ed. 449, 451); and extends to all property within the jurisdiction of the state—to lands already devoted to railway use, as well as to other lands within the state (*United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 685, 40 L. Ed. 576, 582, 16 Sup. Ct. Rep. 427; *Adirondack L. Co. v. New York*, 176 U. S. 335, 346, 44 L. Ed. 492, 498, 20 Sup. Ct. Rep. 460)."

We, therefore, insist that the appellant's petition and application for a rehearing be denied.

Horton & Gill, E. S. Ratliff, Attorneys for Appellees.

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[fol. 187] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING—Sept. 30, 1924

And now on this day, it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

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[fol. 188] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER STAYING MANDATE—Filed Oct. 1, 1924

This court having, on September 30th, 1924, denied the application and petition of plaintiff in error for a rehearing of the above



entitled cause, and the plaintiff in error now showing to the court that it desires to appeal to the United States Supreme Court from such action and the judgment rendered herein.

It is therefore, for good cause shown, ordered by the court that mandate to the trial court in this case be withheld pending determination of the case by the United States Supreme Court.

Dated this first day of October, 1924.

N. E. McNeill, Chief Justice.

Attest: Wm. M. Franklin, Clerk Supreme Court of Oklahoma,  
by Reuel Haskell, Jr., Asst. (Seal.)

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[fol. 189] IN SUPREME COURT OF OKLAHOMA

CLERK'S CERTIFICATE

I, Wm. M. Franklin, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 189 inclusive, are a true, full and complete transcript of the record and proceedings, in the Supreme Court of Oklahoma in the case of Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, appellants and plaintiffs in error, vs. The State of Oklahoma, and City of McAlester, Oklahoma, appellees and defendants in error, and also of the opinion of the court rendered therein and the plaintiffs in error's petition for a rehearing and the order of the court denying same, all as same now appear on file and of record in my office as such Clerk.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court of Oklahoma at the City of Oklahoma City this 28th day of October, 1924.

Wm. M. Franklin, Clerk Supreme Court of Oklahoma, by  
Reuel Haskell, Jr., Assistant. (Seal of Supreme Court,  
State of Oklahoma.)

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[fol. 190] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed Dec. 6,  
1924

It is hereby stipulated and agreed by and between counsel of record for plaintiffs in error and defendants in error that in order to save expense in the printing of the record herein, the following portions of the record, the same being sufficient to show the errors complained of, both on writ of error and on writ of certiorari, shall be printed, except the following:

The entire record shall be printed except all cross examination and all re-direct examination of the witness E. M. Frye. (Rec. pp. 49-61); and except

All evidence of the following witnesses:

G. W. Shields (Rec. pp. 77-90).  
 J. L. Halbrook (Rec. pp. 91-94).  
 J. C. Bentley (Rec. pp. 95-97).  
 J. S. Gilbertson (Rec. pp. 98-100).  
 J. B. Vogel (Rec. pp. 100-101).  
 All maps and blue prints (Rec. pp. —).

It is further stipulated and agreed that if, from any oversight or omission, any necessary part of the record be not printed, that the plaintiffs in error shall have the right or be required by defendants in error to print any further or additional portions thereof.

Dated this 1st day of November, 1924.

Joseph M. Bryson, Maurice D. Green, Howard L. Smith,  
 Attorneys for Plaintiffs in Error. E. S. Ratliff, W. J.  
 Horton, Attorneys for Defendants in Error.

[fol. 191] [Endorsed:] No. —. In the Supreme Court of the United States. Missouri, Kansas & Texas Railway Company et al., Plaintiffs in Error, vs. The State of Oklahoma et al., Defendants in Error. Stipulation as to Printing Record.

[fol. 192] [File endorsement omitted.]

Endorsed on cover: File No. 30,694. Oklahoma Supreme Court. Term No. 729. Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, plaintiffs in error, vs. The State of Oklahoma and the City of McAlester, Oklahoma. Filed November 17, 1924. File No. 30,694.